A HANDY BOOK
ON
PROPERTY LAW
BY
LORD ST. LEONARDS

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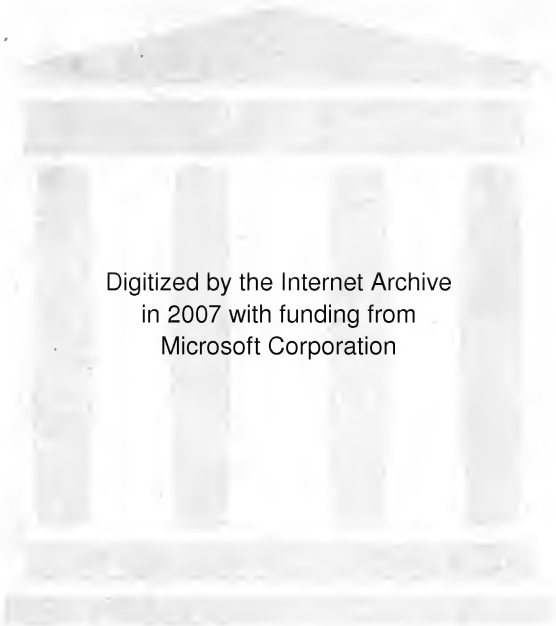

A

HANDY BOOK

ON

PROPERTY LAW

IN A SERIES OF LETTERS

BY

LORD ST LEONARDS

SECOND EDITION

WILLIAM BLACKWOOD AND SONS
EDINBURGH AND LONDON
MDCCCLVIII

PRINTED BY WILLIAM BLACKWOOD AND SONS, EDINBURGH.

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INTRODUCTION.

NOTE *to page* 61.

The provision in 16 & 17 Vict., c. 117, referred to in p. 61, for merging land-tax, was repealed by the 19 & 20 Vict., c. 80, sect. 3, for the future; so that the above provision operates only on purchases of land-tax between the 20th August 1853 and the 29th July 1856.

that you cannot readily comprehend your solicitor when you seek his advice: that, in a word, you have been plunged into a lawsuit, which a slight previous knowledge might happily have prevented. It is, unquestionably, a matter of profound regret, that so large a proportion of contracts respecting estates should lead to litigation. It is equally to be regretted that, however desirous the man of property may be to understand the effect of his daily contracts, there is no source to which he can apply for the desired information. You ask me to remove the cause of your complaint, and in

LETTER XXV.

CHURCH PATRONAGE—LIGHTS—EASEMENTS, &C. ACQUIRED BY TIME.

INTRODUCTION.

LETTER I.

You complain to me that, although utterly ignorant of law, you are constantly compelled to exercise your own judgment on legal points: that you cannot always have your solicitor at your elbow; and yet a contract for the sale, purchase, or lease of an estate, a loan, or, perhaps, even an agreement to make a settlement on a child's marriage, must be entered into at once; and it is not until you have gone too far to retreat that you learn what errors you have committed: that you are even at a loss in giving instructions for your will, and wholly incapable of making the most simple one for yourself: that you cannot readily comprehend your solicitor when you seek his advice: that, in a word, you have been plunged into a lawsuit, which a slight previous knowledge might happily have prevented. It is, unquestionably, a matter of profound regret, that so large a proportion of contracts respecting estates should lead to litigation. It is equally to be regretted that, however desirous the man of property may be to understand the effect of his daily contracts, there is no source to which he can apply for the desired information. You ask me to remove the cause of your complaint, and in

particular to point out the precautions to which you should attend in selling, buying, mortgaging, leasing, settling, and devising estates. You express, besides, a desire to know something in a popular way of the nature of the different interests in property, and of the mutual rights of yourself and your wife, and your power over your children, which would lead me to introduce the new law of divorce to your notice. You further ask me to give you some general hints as to your conduct in the character of a trustee or executor, which may keep you from harm. In short, you want, in the form of familiar letters, what is now so much in vogue, a work upon an interesting subject calculated "for the million," whom I should be but too happy to assist: such a work, whilst it imparts knowledge, may, perchance, beguile a few hours in a railway carriage. I have in my youth and in my manhood written much for the learned in the law; why should I not, at the close of my career, write somewhat for the unlearned? This I shall proceed to do concisely, and without encumbering my pages with many technical phrases. I must premise, that I shall say little which is not warranted by decided cases; but I shall not burden you with references to them, as they lie scattered in many a bulky volume to which you have not access.

LETTER II.

To enable you to understand some terms which I must necessarily use in speaking of the remedy for breach of contract, I must explain the difference between law and equity. It is peculiar to the constitution of this country, that the law on the same case is frequently administered differently by different courts; and that not from a contrary exposition of the *same* rules. It must sound oddly to a foreigner, that on one side of Westminster Hall a man shall recover an estate without argument, on account of the clearness of his title; and that on the other side of the Hall his adversary shall, with equal facility, recover back the estate. In all other countries, if we except America, which adopted in a great measure our laws, the law is tempered with equity; and the same grounds rule the same case in all the courts of justice. The division of our law into what is termed legal and equitable, arose partly from necessity and partly from the desire of the ecclesiastics of former times to usurp a control over the common-law courts. Our legal judges heretofore adhered so strictly to technical rules, although frequently subversive of substantial justice, that the Chancellors interfered, and moderated the rigour of the law according, as it is termed, to equity and good conscience. The judges in equity soon found it necessary, like the common-law judges, to adhere to the decisions of their predecessors; whence it has inevitably happened, that there are settled and inviolable rules of equity, which require to be moderated

by the rules of good conscience, as much as ever the most rigorous and inflexible rule of law did before the Chancellors interposed on equitable grounds. However, as the law of property is now administered in the different forums, allowing for the imperfection of all human laws, it exhibits a splendid and comprehensive code of jurisprudence. Legislative attempts have been made to give to all our great courts the like jurisdiction over contracts; but they have, in a great measure, necessarily failed, and they never can succeed until the requisite machinery is provided in the common-law courts to enable them to perform the duties which now devolve upon the Courts of Chancery. Whether such a measure is desirable, I must leave it to the authorities to decide. America has been referred to as a great example of the benefits of the fusion of law and equity. But there were great complaints in that country against the mode in which equity was administered; and I do not understand that law and equity have been united there, although now the same judge administers both law and equity, sitting alternately as a common-law or an equity judge, as occasion may require, just as our Court of Exchequer formerly exercised both jurisdictions. We should always bear in mind that it is not a question whether, as an abstract proposition, we should sever law and equity, but it is whether, now that they have been severed for centuries, it is wise to unite them generally. Many powers may with great advantage be extended to both jurisdictions, which now or formerly were confined to one.

The essential difference between law and equity, as it affects the subject upon which I am writing, consists in this, that equity will give you the thing itself for which you have contracted; whereas the law can only give you

a pecuniary compensation for the dishonesty of the other party in not fulfilling his contract. Thus, if you were to sell your estate to your neighbour Tompson, and were afterwards, disliking the bargain, to refuse to convey it to him, he would have it in his election to proceed against you either at law or in equity. If he resolved to proceed at law, he would bring an action against you for the recovery of damages for breach of contract, and a jury would decide the amount of the damages which you ought to pay; but still you would retain the estate in the same manner as if you had never contracted to sell it. But if he wished to have the estate itself, he would file a bill in equity against you, for what is termed a specific performance, or a performance in *specie*, and the court would not, like a court of law, in effect, let you off the contract on payment of damages, but would compel you to convey the estate itself to the purchaser upon his paying the purchase-money to you. But of course, as the court compels you to *perform* the agreement, there are no damages to pay. This equity is founded upon the principle, that the court considers that as actually performed which is agreed to be done; so that the instant after you have entered into a contract to sell an estate, the court considers the estate as belonging to the purchaser, and the purchase-money as belonging to you, and so *vice versâ*. The terms *specific performance*, and *action for breach of contract*, will now, I hope, be familiar to you. I shall frequently be compelled to use them in the course of my correspondence.

The remedy in equity, I must remark, is open to a seller as well as a buyer, although a seller merely wants the purchase-money; so that if a vendor would prefer getting rid of the property, and receiving the whole of the purchase-money, to keeping the estate, and taking

his chance of the amount of damages at law, he may apply to equity for a specific performance.

But equity will not interfere in every case. A man acting without good faith cannot require the extraordinary aid of the court, but will be left to his remedy at law, where his bad conduct will have its full operation with a jury. And in many cases equity will not interfere, although the applicant or plaintiff, as he is called, has acted *bonâ fide;* for instance, where the estate has by surprise or mistake been sold at an undervalue. Thus, where the known agent of the seller bid for the estate at an auction on behalf of the purchaser, and other persons present, thinking that he was bidding as a puffer on the part of the seller, were deterred from bidding, the court, on the ground of surprise, refused to interfere against the seller, who resisted the sale.

Equity also looks to the substantial intention of the parties, whereas the courts of law adhere more strictly to the letter of the contract. Thus, if an estate is described in a particular of sale to be in good repair, and it turns out to be in bad repair, the seller cannot enforce the contract at law; but equity, if the purchaser is not in want of immediate possession, so that there is time to do the repairs before possession is essential to him, will compel him to take the house upon being allowed a sufficient sum to repair it: if a man sell a leasehold estate, as having 70 years to run, and the term is only 68, the purchaser will in equity be decreed to take the estate with an abatement; at law, the contract cannot be enforced by the vendor: again, if the time is stipulated for the performance of the contract, that stipulation is of the essence of the contract at law; whereas in equity, if the time was not material, or the party complaining was aware of the cause of the delay

at the time of the agreement, and the other party is not wilfully lying by, equity will compel a specific performance in the same manner as if the party had been ready to perform his agreement by the time stipulated: if the seller cannot make a title to the whole estate sold, the purchaser is not at law compellable to take the part to which a title can be made; but in equity, if the part to which a title cannot be made is not necessary to the enjoyment of the rest, equity will compel him to take it, and will allow him a proper abatement out of the purchase-money. In one case a man purchased a house on the north side of the Thames, which was supposed to be in Essex, but which turned out to be in Kent, a small part of which county happens to be on the other side of the river. The purchaser was told he would be made a churchwarden of Greenwich, when his object was to be a freeholder in Essex; yet he was compelled to take the house. These instances, and others to which I shall in subsequent letters draw your attention, will sufficiently show the difference, in these respects, between law and equity. The latitude which a court of equity allows itself in enforcing agreements against the letter, and, perhaps, in some cases, contrary to the spirit of the contract, may be narrowed by the express stipulation of the parties. This should always be attended to.

The ground upon which equity proceeds in the cases which I have mentioned is, that the agreement can be performed in substance. A purchaser cannot be compelled, even in equity, to take an undivided part of an estate—as where the seller and a third person are tenants in common, so that each is entitled to only an undivided moiety—if he contracted for the entirety; nor a leasehold, however long the term in it may be, or a copyhold instead of a freehold. And if you were to buy

at an auction a mansion-house in one lot, and farms, &c., in others, equity would relieve you from the whole contract if no title could be made to the mansion-house.

From the different rules of law and equity it frequently happens that both courts are resorted to with relation to the same contract. I will give you an instance of this: Suppose that you had bought an estate of Tompson, and the agreement was to be performed by a day named, and that he made out his title, and was ready to convey to you at the time, but your money was not ready, Tompson might bring an action against you for damages for breach of the contract; but if the day appointed was not material, you might file a bill against him for what is termed an *injunction*, and a specific performance; and equity would accordingly *enjoin* him not to proceed further with the action, and would compel him to convey the estate to you upon payment of the purchase-money, but you would not be allowed to be guilty of further delay in payment of the purchase-money.

If you sell an estate, your title to which proves bad, and you cannot cure the defect, equity of course cannot relieve the purchaser, unless he choose to take the title with all its faults; but the purchaser may recover damages against you at law. However, where a man is *without fraud* incapable of making a good title, a purchaser can even at law only recover what are called nominal damages—a shilling, for instance. I dare say that you think it high time this Letter should end. You must, however, preserve your patience, or I shall never make a lawyer of you.

LETTER III.

In my last Letter I mentioned the principle upon which a specific performance is decreed—viz. that the Court considers that which is agreed to be done as actually performed, so that from the time of an agreement for sale the estate in equity belongs to the purchaser, and the purchase-money to the vendor. I hasten to unfold to you the very important consequences of this doctrine, to which a slight inattention on your part might totally overthrow your plans in the disposal of your property amongst your family.

I shall first consider you as a *seller*. As the estate is no longer yours, if you have devised it, it will not pass to the devisee except as a mere trustee for the purchaser; and even if you have by your will directed it to be sold, and actually given the money to arise by the sale to a legatee, yet if you sell the estate yourself, he will not be entitled either to the purchase-money or the estate. But the purchase-money, although not paid, will go to your personal representative in the same way as the rest of your personal property. Therefore, where you wish the money to go to the person who would have taken the estate, you should make a bequest of it to him at the time you enter into the agreement. And as you may afterwards abandon the contract, by consent of the other party, or it may be such a contract as a court of equity will not enforce: you should also provide for a sale of the estate, at all events, in favour of the object of your bounty.

It is material here to observe, that if you give a man only an option to purchase your estate, yet if he accept it, even after your death, the nature of the property is changed. I think that I can make this quite plain to you. You have now both land and money. I will suppose that you have by your will given your estate to your eldest son, and the money amongst your younger children. You then grant a lease of the land to Tompson, and give him an option to purchase the estate for £25,000 at any time within ten years. You would think, no doubt, that you had secured the estate to your eldest son. But, on the contrary, if you die before the end of the 10 years, and Tompson, after your death, but within the 10 years, elect to purchase the estate, the money would go to your younger children, and your eldest son would be stripped of all his fortune! To obviate this, if you should enter into such a contract after making your will, you must, by a codicil, give the money to arise by sale to the person to whom you have given the estate, and then he will be secure of the property: and if you make your will after the contract, expressly declare that your devisee shall have the purchase-money, if the lessee make his option to take the estate.

I shall now consider you as a *buyer*. The estate is yours from the moment the contract is executed; and the purchase-money must be paid out of your personal property. The consequence of equity thus deeming the estate to belong to you, is, that you may dispose of it by your will, or otherwise, even before the conveyance, just the same as if you had paid the purchase-money, and the estate were actually conveyed. You must, therefore, upon a purchase, always reflect that your disposable cash is decreased by the amount of the

purchase-money; and that unless you otherwise dispose of it the estate will go to your heir. A moment's reflection will show what serious consequence may follow from a neglect on your part; for suppose you purchase an estate with the £10,000 in the funds, which you have given by your will to your younger children, and which constitutes the bulk of your personal property, and should neglect to devise the estate, the money must go to pay for it, at the expense of your younger children, who would be left nearly destitute, whilst your eldest son, to whom the estate would descend, would have a large fortune. Distressing cases of this kind are continually happening.

If your personal property undisposed of is not sufficient to pay for the estate, it would be better, perhaps, to direct it to be sold again, and the first purchase-money to be paid out of the money produced by the re-sale. You must remember that in devising or suffering an estate to descend which you have purchased and not paid for, your devisee or heir will be entitled to have the purchase-money paid out of your personal property, although you may have given it all to another person. A most vexatious case once happened: A younger brother agreed to purchase an estate from his elder brother; the conveyance was accordingly executed, but the money was not paid. The younger brother then made his will, giving his property to his brother, subject to legacies, and made him executor. The will, however, was not executed so as to pass the estate. The younger brother died, and the elder brother took the estate as his heir, and also paid himself the purchase-money out of the personal property; by which he disappointed the legatees, who lost their legacies, whilst he got both the estate and the purchase-money for it.

On the other hand, you must guard against the chance of the estate not being ultimately conveyed according to the agreement. For if equity should for any reason refuse to execute the contract, or a good title cannot be made, the person to whom you have given, or suffered the estate to descend, will not be entitled to have it paid for out of your personal property, although he may be willing to accept such a title as can be made to it; because equity will not interfere unless there is a binding contract at the death of the party. You should, therefore, provide for the purchase of another estate, of equal value, for your devisee or heir, in case the one purchased should not be conveyed to him. I must, however, remark, that if by your will you direct an estate to be bought *for which you have not actually contracted*, and the estate cannot be bought according to your direction, yet equity will decree the money to be laid out in the purchase of another estate for the benefit of the devisee.

Before I close this Letter, I shall give you a caution as to your Hampshire estate, wherein you have only a long term of years, which you have bequeathed to your second son John. You tell me that you are about to purchase the fee, or, as you express it, to buy the estate out and out. Now the effect of a conveyance of the fee to you will clearly be to put an end to the term, and to give you the entire interest in the estate discharged from the lease, and so the bequest to John would be defeated; and the effect may be held to be the same, immediately after the contract is executed, and even before the conveyance, to guard against which you should give the fee to John without delay by a codicil to your will. And in giving this estate to John, after you have agreed to buy the fee, but before the conveyance, you should go a

step further, and expressly declare that he shall have the lease, although he cannot obtain the fee, for it may happen, as it has in a similar case, that the seller is not the owner of the estate, or cannot make a good title to it.

You should bear in mind that, by the new law of wills, any estate which you may buy after the making of your will, will pass by a general devise in it of all your estates. This I shall explain to you in a later Letter.

LETTER IV.

In this Letter I propose to draw your attention to the precautions to be observed on the sale and purchase of estates as between yourself and the other party; and first as to your conduct and duty as a Seller.

I will not argue with you, whether in selling an estate you are bound in conscience to disclose all its defects to the purchaser. Moralists, as you know, agree that a seller is bound to do so, although the principle has been controverted. I shall content myself with stating how the *law* on this subject stands.

If the person to whom you sell was aware of all the defects in the estate, of course he cannot impute bad faith to you in not repeating to him what he already knew; neither will you be liable if you were yourself ignorant of the state of the property. And even if the purchaser was at the time of the contract ignorant of the defects, and you were acquainted with them, and did not disclose your knowledge to him, yet he will be without a remedy if they were such as might have been discovered by a vigilant man. The disclosure of such defects is at most what the civilians term a duty of imperfect obligation; and to claim the aid of the law, you must yourself be vigilant. If, however, you should, during the treaty, industriously prevent the purchaser from seeing a defect which might otherwise have easily been discovered—for example, if you carefully conceal from him the necessary repairs of a wall to preserve the estate from the sea, the contract would not bind the purchaser. In one case, a

seller plastered up a defect in a main wall, and papered it over, so as to conceal the defect, and the purchaser was relieved from the contract.

So if there is a latent defect in your estate, of which you are aware, and which the purchaser could not by any attention whatever possibly discover, you are, it seems, bound to disclose it to him, although you should sell the estate expressly subject to all its faults. Upon this point, however, the authorities are divided.

This point has several times arisen on the sale of ships sold *with all faults*, yet described in an attractive manner, and kept afloat, so that the defects well known to the seller cannot be discovered, and that has been held to be a fraud, which renders the sale void. But generally speaking, a sale *with all faults* is binding, and the seller is not bound to disclose faults within his own knowledge, although he must not conceal them. When a seller knows there is a defect, which was concealed before he acquired the property—for example, where the defective wall was plastered and papered over before his purchase, and he only acquired a knowledge of the concealment after his purchase, and he sells with all faults, still he should disclose the defect, although this is a doubtful point in law.

If you actually describe the estate in the particulars of sale or agreement, you will, of course, be bound by the description. And if you misdescribe the estate with a fraudulent intent, it is unimportant that you expressly stipulated that an error in the description of it should not annul the sale. This was decided before the Reform Act, in a case where the estate was described *to be about a mile from a borough-town;* and it was provided in the conditions of sale that an error in the description should not vitiate the sale. It turned out that the

estate was between three and four miles from the place, and therefore the purchaser resisted the contract, and brought an action for recovery of the deposit which he had paid. It was left to the jury to say, whether this was merely an erroneous statement, or the misdescription was wilfully introduced to make the land appear more valuable from being in the neighbourhood of a borough-town. In the former case, the contract remained in force; but in the latter case, the purchaser was to be relieved from it, and was entitled to recover back his deposit. The purchaser had a verdict; so that the jury must have thought the misdescription fraudulent.

The sale of a ground-rent cannot be enforced if the rent is a rack-rent. Where the sale was of a "brick-built house," and the house was built partly of brick and partly of timber, and some parts of the exterior were composed of lath and plaster only, without any party-wall to the house, the purchaser was not compelled to complete the purchase. There must not be a substantial misdescription.

But although you misrepresent the nature of the property, yet the purchaser cannot be relieved if he bought with full knowledge of the actual state of it: thus, if you describe an estate to be in a ring-fence, and the buyer knew that it was intersected by other lands; or you warrant a house to be in perfect repair, and he knew that it was without a roof or windows, he cannot in either case object that the property does not agree with the description of it.

But it would not be safe to rely upon the purchaser's knowledge in opposition to your own statement. If you were to state that a house was in good repair, knowing that it had the dry rot, and were not to communicate

this fact to the purchaser, and the state of the house was not perfectly visible to everybody, you could not enforce the contract, although the purchaser might take the property if he pleased, with a compensation for its defective state.

The same rules apply to encumbrances on the estate, and defects in the title to it, as to defects in the estate itself. You must either deliver to the purchaser the instrument by which the encumbrances were created, or on which the defects arise, or you must acquaint him with the facts, if they do not appear on the title-deeds. If you neglect this, you are guilty of a direct fraud, which the purchaser, however vigilant, has no means of discovering. And if your attorney keep back any encumbrance, he as well as you will be answerable for the fraud.

Thus I have told you what truths you must disclose. I shall now tell you what falsehoods you may utter in regard to your estate. In the first place, you may falsely praise, or, as it is vulgarly termed, puff your property; for our law, following the civil law, holds that a purchaser ought not to rely upon vague expressions uttered by a vendor at random in praise of his property. And it has even been decided, that no relief lies against a vendor for having affirmed, contrarily to truth, that a person bid a particular sum for the estate, although the buyer was thereby induced to purchase it, and was deceived in the value. So you may affirm the estate to be of any value which you choose to name, for it is deemed a purchaser's own folly to credit a bare assertion like this. Besides, value consists in judgment and estimation, in which many men differ.

Again, you may, with impunity, describe your land as uncommonly rich water meadow, although it is imper-

fectly watered. In selling an advowson you may, in like manner, state that an avoidance of the living is likely to occur soon. So where a renewable interest is sold, and a fine on renewal is payable, the seller may state it to be a small fine, although it is of considerable amount. Such statements are cautions to purchasers to inquire. So mere puff, as that a house is fit for a respectable family, is entitled to no weight; but you must not, in answer to inquiries, assert, contrary to the fact, that your house is not damp. You are not bound to inform the purchaser, that upon the tenant's complaint, the full amount of rent has not been paid; nor are you bound to tell him what offers have previously been made to you; for a concealment, to be material, must be of something that the party concealing was bound to state. But you must disclose any right of sporting over the estate, or any right of common over it, or any right to dig for mines upon it, or the liability to repair the chancel of a church, or the like. And you may not refer a purchaser to an agent who is ignorant of circumstances affecting the property of which you yourself are aware. If your agent should be guilty of fraudulent representation, or a fraudulent concealment, you would be liable.

If you should affirm that the estate was valued, by persons of judgment, at a greater price than it actually was, and the purchaser act upon such misrepresentation, you could not enforce the contract in equity. Nor can you with impunity misstate the quantum of rent paid for the estate, because that is a circumstance within your own knowledge: the purchaser may have no other source of information; or your tenants, if he were to apply to them, might combine with you, and so misinform and cheat him. And the purchaser will have a remedy against you for the fraud, although he did not depend upon your statement, but inquired further.

What I have hitherto said applies mostly to your own conduct. I have still a few cautions to give you in regard to those things which must be performed by your agents.

Although it is the usual practice, yet you should never permit the particulars and conditions of sale to be prepared by an auctioneer. Auctioneers know nothing of the title, and continual disputes arise from their misstatements. When a man has an estate to sell he generally goes first to an auctioneer; but I advise you to go to an attorney. I may, however, caution you against allowing your attorney to frame unusual conditions, throwing upon the purchaser expenses which, according to the general practice, ought to be borne by the seller, and compelling him to accept such a title as he would not be bound to accept under a common contract. It may be necessary to provide for special circumstances; but rely upon it that judicious buyers do not attend an auction where improper conditions of sale have been issued; and I advise you, in the character of a purchaser, never to do so without sufficient cause.

If the estate which you intend to sell has been in your family for a length of time, or the title has not been recently investigated, it would be prudent to have an abstract of it submitted to counsel in the first instance. This will enable you to clear up any objection which occurs, before you enter into a contract for sale of the estate. By this precaution you will prevent any delay on your part which might impede the completion of the sale by the time stipulated; and you will, in many cases, avoid the expense necessarily attending tedious discussions of a title. Another advantage of this measure is, that if there should be any defect in the title which cannot be cured, it will be known only to your own agents and counsel. It is, believe me, of the

utmost importance to keep defects in your title from the knowledge of persons not concerned for you. It has frequently happened, that persons concerned for purchasers have communicated fatal defects in a vendor's title to the person interested in taking advantage of them, by which many titles have been disturbed.

It would be useless to state to you what provisions should be contained in the particulars and conditions of sale. They must be prepared by your solicitor. I may, however, observe, that the nature of the property should be correctly stated, and that where the estate is held under the same title, and sold in lots, some provision should be made as to the expense of copies of deeds, to which all the purchasers would otherwise be entitled at your expense ; a burden that has frequently considerably reduced the amount of the purchase-money.

Where the deposit is directed to be paid to the auctioneer, he is entitled to retain it until the contract is completed, without paying interest for it, because he is considered as a stakeholder or depositary. To obviate this, where the sum is large, it may be provided that the deposit shall be invested in Exchequer bills. You should be cautious whom you employ as an auctioneer, for any loss by his insolvency would fall upon you ; he is your agent.

I may here observe, that an agent to sell or to buy an estate may be appointed by parol, that is, without writing ; but you will not act prudently if you do not specify in writing to your agent the terms upon which you propose to sell or buy. The authority to sell does not include a power to receive the purchase-money, which therefore, should never be paid to an agent without an express authority from the seller. Even an auctioneer to whom, by the conditions of sale, the deposit is to be paid, has no authority to receive any further part of the purchase-

money. If a purchaser is directed to pay the purchase-money to an agent on the completion of the purchase, he cannot safely pay any part of it to him before the completion. An auctioneer or other agent is not at liberty to take a note or other security for the purchase-money. The seller can compel him to pay the money. The purchaser may safely pay the money, or remit it to a broker or other person by the post, for example, if so directed by the seller, and he would not be answerable for any loss, if he use due precaution. If the seller accept a valid cheque on a banker for the purchase-money, and he is guilty of negligence in presenting it, any loss by the banker's insolvency will fall upon him.

An agent, after he has bought or sold according to his authority, and entered into an agreement binding on his principal, cannot vary the terms of the contract ; but if he exceed his authority, his principal may, of course, ratify his act. Either a seller or a purchaser may revoke his authority to an agent at any time before the latter has executed a binding agreement to sell or buy. An agent, of course, cannot go beyond his authority. If, for example, he were to bid more for an estate than he was authorised, he would himself be bound as the actual purchaser, but his principal would not be bound. It has been held that a seller may falsely pretend to be an agent for another, although he is selling for his own benefit, and that the purchaser will be bound unless he can show that he has suffered damage, or that the misrepresentation induced him to enter into the contract. This cannot often arise upon the sale of an estate. Where a purchaser of a picture—a Claude—from an agent, with an undisclosed principal, had an impression that it came out of a particular collection, and the ownership in his view enhanced its value, and the seller's agent, knowing that the purchaser laboured under a deception as to the real owner

of the picture, permitted him to remain in it, although he thought it would influence the purchaser's judgment, the contract was held void at law.

You may, without public notice, appoint a person to bid for you at the sale, in order to prevent the estate from being sold at an undervalue. This is generally termed *puffing*. Cicero, in his *Offices*, declares his opinion that a vendor ought not to appoint a puffer to raise the price; nor ought the purchaser to appoint a person to depreciate the value of an estate intended to be sold. And Huber, the civilian, lays it down, that if a vendor employ a puffer, he shall be compelled to sell the estate to the highest *bonâ fide* bidder, because it is against the faith of the agreement by which it is stipulated that the highest bidder shall be the buyer. Great contrariety of opinion has prevailed in our courts as to the legality of appointing a puffer; but it is now settled that you may employ a person to prevent a sale at an undervalue. But if you go beyond this, and send a puffer to take advantage of the eagerness of bidders to screw up the price, that will be deemed a fraud, and the sale will not be binding on the purchaser. Neither can you appoint more than *one* person to bid. It is proper that a man should be permitted to appoint a person to *guard* his interests against the intrigues of bidders; but it does not follow that he may appoint more than one. The only possible object of such a proceeding is fraud. An auction so constituted is simply a mock auction. Your case would be obnoxious to the same rule were you to appoint even *one* puffer, with unlimited power, to take advantage of the eagerness of bidders to increase the biddings. And if you state in the particulars, or advertisements, that the estate is to be sold *without reserve*, the sale would be void against a purchaser if any person were employed as a puffer, and actually bid at the sale.

If you employ an agent to sell an estate by public auction, a sale by private contract is not within his authority; nor does it seem to be material that the estate sold for more than the price fixed, for it might have fetched a still greater sum at a public auction. But if an agent is directed to sell an estate by private contract, and he dispose of it by public auction for a larger sum than the principal required, I conceive that, in most cases, the sale would be binding on the principal.

You will find it necessary to make a contract with your auctioneer in order to avoid heavy charges. And you should stipulate that no custom of the trade is to authorise any charge not provided for by your contract. You should provide for both cases—viz. the sale and the non-sale of the property. If you employ more agents than one, you should expressly stipulate with each of them, that the commission shall be paid to the agent only of whom the purchase is made, or you may have also to pay large commissions to the other agents for what is termed finding a purchaser. You should carefully read the card or paper with which they usually supply persons applying to them; for in some instances the card or paper expressly states "that the agent is to be paid his commission although the sale should not be conducted by him, if it is effected through any information afforded by him," and dealing with the agent after such a notice would, I fear, bind you to his terms. It is not prudent to answer the inquiry by an agent whom you have not employed, whether your property is to be let or sold, for an incautious answer might justify him in placing your property on his books, and making you in the result liable for some compensation to him, although you really employ and pay another man.

LETTER V.

I SHALL now dismiss you from your character of a seller, and treat you as a Buyer.

In running over, in my last Letter, the misstatements which a seller may with impunity make, I of course was looking to the situation in which I now consider you to stand; for when you know how far an unprincipled vendor *may* with safety go, you can guard against fraud by not trusting to misrepresentations which are made without fear of retribution.

If you should have a right to avoid a purchase on the ground of fraudulent representations by the seller, you ought at once to exercise your right, and not go on dealing with the property as the owner of it, for such conduct may amount to a waiver of your right to rescind the contract.

With the exception of a vendor, or his agent, suppressing an encumbrance, or a defect in the title, it seems clear that a purchaser cannot obtain relief against him for any encumbrance or defect to which his covenants do not extend; and therefore if a purchaser neglect to have the title investigated, or his counsel overlook any defect in it, he has no remedy beyond what the seller's covenants may afford. It has even been laid down, that if one sell another's estate, without covenant or warranty for the enjoyment, it is at the peril of the purchaser, because he might have looked into the title; and there is no reason he should have an action by the law, where he did not provide for himself. I may remark, by the

way, that as counsel, that is, barristers, have no remedy for recovery of their fees, which are considered purely gratuitous and honorary, they are not deemed liable to their clients for any blunders which they commit, however gross. But it is otherwise as to attorneys; they may maintain an action for their fees; and if a purchaser is damnified by the gross want of skill in an attorney, or by his neglect to search for encumbrances, he may recover at law against the attorney for any loss which he may sustain. But where the attorney has acted under the advice of counsel, he is safe. To return: You will collect from the observations in my last Letter, that as a purchaser you are entitled to relief on account of any *latent* defects in the estate, or the title to it, which were not disclosed to you, and of which the vendor, or his agent, was aware. In addition to this protection afforded by the law, you, as a provident man, ought not to trust to the description of the vendor, or his agents, but to examine and ascertain the quality and value of the estate yourself, and you should have the title to it inspected by counsel.

If there are rights of way over the property, you cannot object, although they are not noticed in the contract. A right of way is not a latent defect, and you ought to inquire. If you buy a mine, and it is full of "faults," you will be bound, for they are incidents to a mine, as you must have known, and therefore ought to have inquired. The very name of the place where the property is situated may mislead you; for example, a house "in Regency Square, Brighton," was sold by auction in London, and the buyer bought on that description, never having seen the house. But the houses running from the north-west corner of the Square into an adjoining street, although in no respect within the Square, had

always been numbered, and named, and treated as part of the Square. This house was, unluckily for the purchaser, in the street and not in the Square, but he was compelled to take it, as he ought to have inquired. So the immediate neighbours may be such as to prevent the purchaser from taking his family to the house recently purchased for their habitation, yet he must complete his purchase. These instances are sufficient to show the necessity of previous inquiry.

I may here remark, that although a vendor is bound to tell the purchaser of *latent defects*, yet a purchaser is not bound to inform the vendor of any *latent advantage* in the estate. If you were to discover that there was a mine on an estate, for which you were in treaty, you would not be bound to disclose that circumstance to the vendor, although you knew that he was ignorant of it. Nor need you as a purchaser adhere closely to truth in procuring the estate at as cheap a price as you can. In a case where a false statement by a purchaser was held not to give the seller a right of action, the Court said, that the question was, whether the purchaser was bound to disclose the highest price he chose to give, or whether he was not at liberty to do that as a purchaser which every seller in this town does every day, who tells every falsehood he can to induce a buyer to purchase.

A purchaser may misrepresent the seller's chance of sale, or the probability of his getting a better price for his property than that which the buyer offers. But a purchaser is always in danger who makes an actual misrepresentation, which tends to mislead the seller. And he cannot justify misrepresenting the estate to any person desirous of purchasing it, or concealing the death of a person, of which the seller is ignorant, by which the estate is increased in value.

In regard to false representations to a purchaser of value or rent, I must still observe that the same remedy will lie against a person *not interested in the property*, for making such false representations as might be resorted to, in case such person were owner of the estate; but the statement must be made *fraudulently*, that is, with an intention to deceive; whether it be to favour the owner, or from an expectation of advantage to the party himself, or from ill-will toward the other, or from mere wantonness, is immaterial. And in these cases, to use the language of Sir William Grant, it will be sufficient proof of fraud to show, first, that the fact as represented is false: secondly, that the person making the representation had a knowledge of a fact contrary to it. The injured party cannot dive into the secret recesses of the other's heart, so as to know whether he did or did not recollect the fact; and therefore it is no excuse in the party who made the representation to say, that though he had received information of the fact, he did not at that time recollect it.

And on the same ground, if a person having a right to an estate permit or encourage a purchaser to buy it of another, the purchaser will be entitled to hold it against the person who has the right, although a married woman, or under age. And the same rule has even been extended to a case where the representation was made through a mistake, as the person making it might have had notice of his right.

If you suspect that any person has a claim on an estate which you have contracted to buy, you should, before proper witnesses, inquire the fact of him, *at the same time stating that you intend to purchase the estate;* and if the person of whom the inquiry is made have an encumbrance on the estate, and deny it, equity would

not afterwards permit him to enforce his demand against you. The witnesses in this case should take a note of what passes, because a witness may refresh his memory by looking at any paper, if he can afterwards swear to the facts from his own memory.

Where it is stated upon a sale, even by auction, that the estate is in lease, and there is no *misrepresentation*, the purchaser will not be entitled to any compensation, although there are covenants in the lease contrary to the custom of the country, because whoever buys with notice of a lease is held to have knowledge of all its contents. If, therefore, you have notice of a lease, or even that the estate is in the occupation of a tenant, you should not sign a contract for the purchase of the estate until your solicitor has seen and read the leases, unless the vendor will stipulate in writing that they contain such covenants only as are justified by the custom of the country. And even such a stipulation is not quite satisfactory, for there is frequently great difference of opinion as to what is the custom of any particular place.

And in buying a leasehold estate, it is absolutely necessary to know the contents of the lease, particularly the covenants on the tenant's part. They may be onerous, and may, for example, prohibit you, as the purchaser, from assigning without the landlord's consent; yet you would be bound by them, because you would be held to have bought with implied notice of them. So it is not unusual to stipulate, in conditions of sale of a leasehold property, that the production of a receipt for the last half-year's rent shall be accepted as proof that all the lessee's covenants were performed up to that period. Never bid for an estate clogged with such a condition, for if there had been a breach, of which the lessor could take advantage, notwithstanding his receipt of rent, you

might lose the property after you had paid for it. There are some acts against which no relief can be obtained; for example, the tenant's neglect to insure, or his insuring in an office, or in names not authorised by his lease; and you should not rely upon the mere fact that the insurance is correct at the time of sale; there may have been a prior breach of covenant, and the landlord may not have waived his right of entry for the forfeiture.

Where difficulties arise in making out a good title, you should not take possession of the estate until every obstacle is removed. Purchasers frequently take this step, under an impression that it gives them an advantage over the vendor, but this is a false notion: such a measure would, in some cases, be deemed an acceptance of the title. If, however, the objections to the title be remediable, and you should be desirous to accept possession of the estate, you may in most cases venture to do so, provided the seller will sign a memorandum importing that your taking possession shall not be deemed a waiver of the objections to the title. And although it is not advisable to do so, yet you may, with the concurrence of the seller, safely take possession of the estate at the time the contract is entered into; because you cannot be held to have waived objections of which you were not aware; and if ultimately the purchase cannot be completed, on account of objections to the title, you will not be bound to pay any rent for the estate, unless it is provided for by the contract. When you sell you should keep this in view.

LETTER VI.

I HAVE not yet dismissed you from your character as a purchaser; but now that you have, according to my suggestions, viewed the property you propose to purchase, and inquired into the nature of the leases, or if it be a leasehold estate, into the liabilities of the lessee or assignee, and carefully considered the conditions of sale, you may venture into the auction-room. If a man proposes to buy an estate by private contract, he generally takes all proper precautions, and pertinaciously objects to any unusual stipulations in the contract on the part of the seller; yet he walks confidently into an auction-room, and often bids for an estate which he has not seen, and upon conditions which he has not read, or if he have read, has not understood them. It has been gravely doubted whether one man is influenced by the biddings of another: few men who have attended auctions will entertain this doubt. Not only are we influenced by the biddings of others, as evidence that they are willing to give the price they bid, but every bidding on an advance of our own removes our chance as the last bidder. The spirit of competition, besides, animates most men. An advance bidding is an opposition to our own desire openly expressed, to become the purchaser. Before, therefore, you enter the auction-room, make up your mind as to price, and do not be led away by the persuasions of the auctioneer, who is the agent of the seller, or the biddings of others. Bear in mind, too, that puffers may be amongst the bidders, although you may

not be able to ascertain the fact, and that the seller is at liberty to privately appoint one bidder, to prevent the property from being sold below his price. You cannot therefore obtain it for less, although you may be induced to buy it, contrary to your sober calculations, at a higher price. It is rarely that an estate is put up by auction fairly to be sold for what it will fetch. Notwithstanding the hammer has fallen, we constantly see announcements that the property was not sold at the auction, and that the auctioneers are authorised to treat for the sale of it by private contract.

The auctioneer is of course the seller's agent, pending the completion of the sale by auction, and what you would probably not conjecture, he becomes, by your bidding, also your agent at the sale; so that by putting down as you proceed with your biddings, your name, and the sum you bid, and connecting them with the description of the estate, &c. in the conditions, he can bind you to the sale.

If you repent of your bidding, you may countermand your bidding at any time *before the lot is actually knocked down;* because the assent of both parties is necessary to make the contract binding: that is signified on the part of the seller by knocking down the hammer. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. If a bidding was binding on the bidder before the hammer was knocked down, he would be bound by his offer, and the vendor would not, which can never be allowed.

You need only look at the particulars and conditions. An auctioneer cannot contradict them at the time of sale by a verbal statement; although, perhaps, you would be bound, if he could bring home to you particular personal information of it. What is termed the

babble of the auction goes for nothing. So the auctioneer cannot, by reading a lease at the auction, bind the purchaser to misdescriptions in the particulars. A mere general statement to the company will not affect you, either at law or in equity. I need not suggest to you how far a man may, consistently with good faith, take advantage of the omission in the particulars, if he distinctly understood the verbal statement at the sale.

When the sale is concluded, if you are the purchaser, you will be called up by the auctioneer and required to sign a short agreement already prepared at the end of the particulars and conditions of sale. But usually the auctioneer will not offer to sign a reciprocal agreement as the agent of the seller. You should not sign unless a like contract is signed and delivered to you by the auctioneer.

I have already informed you, that if your agent bid more for the estate than you empowered him to do, he himself would be liable, but you would not. But unless you expressly limited him as to price, it seems that you would be bound.

If after employing a man to bid, you should be so *dishonest* as to deny the authority (in seeking instruction you must not quarrel with your master's mode of conveying it), the agent, unless he could prove the commission, would be compelled to complete the purchase himself; but he would afterwards be able to put you to your oath as to the transaction; and if you admitted, or he could prove the authority, you would be compelled to take the estate at the sum which you authorised him to bid for it. I need not tell you, that by falsely denying the authority, you would incur the penalty attached to the commission of perjury. On the other hand, if you merely employ a man by parol, that is, by word of

mouth, to buy an estate for you, although he buy it accordingly, yet if he hold himself out as the real purchaser, *and no part of the purchase-money was paid by you*, you cannot compel him to convey the estate to you, because that would be directly against the provisions of an Act of Parliament, called the Statute of Frauds (29 Charles II., chap. 3), which requires a writing in such cases. And although the man should afterwards be convicted of perjury in denying the trust, yet that will not enable equity to compel him to convey the estate to you; but as you cannot avail yourself, in any civil proceeding, of the man's conviction, you would be a competent witness to prove the perjury. You would therefore have at least the satisfaction of making an example of him.

The vendor cannot object that your agent purchased in his own name, whereas he is a trustee for you; for it happens in a vast proportion of cases that the contract is entered into in the name of a trustee; and the mere fact of a quarrel having taken place between the seller and you, totally unconnected with the subject of the contract, or even a bare refusal by the seller to deal with you, is not a sufficient ground for his refusing to convey to you.

But if you applied to purchase the estate, and the owner expressly refused to treat with you unless the money was paid down, which you were unable to pay, and then you procured some other person to purchase the estate on your account, it seems clear, that at least the purchase-money must be ready at the very day appointed. So if you should apply to Mr Bigg, to sell you an estate on behalf of Tompson, for whom, as we know, he has a great affection, and Bigg should on that account be induced to take less for the estate than he otherwise would have done, or even, perhaps, without this circum-

stance, the agreement could not be enforced against Bigg, unless it was really made on behalf of Tompson ; but if Tompson would patronise the sale, execution of the agreement would be compelled, although he might sell the estate to you the next day.

The following case shows to what extent this doctrine is carried. A purchaser of a house adjoining to another occupied by the seller, agreed with the seller verbally, that he would not let the house to any person not agreeable to him. A man of the name of Langstaffe applied for a lease, and stated that he knew the vendor intimately, and that there would be no objection to granting him a lease. The seller, however, disapproved of Langstaffe, and so far from knowing him intimately, had only seen him at a tavern. Lord Chancellor Camden set aside the agreement which Langstaffe had obtained, with costs. A similar case is mentioned in Hawkins's Life of Johnson. Peele, the bookseller, had a house near Garrick's, at Hampton. Peele had often said that as he knew it would be an accommodation to Garrick, he had given directions that, at his decease, he should have the refusal of it. On Peele's death a man in the neighbourhood applied to the executors, pretending that he had a commission from a friend or relative of Peele's, who lived in the country, to buy the house at any price, and he accordingly obtained a conveyance of it to a person nominated by him, under a secret trust for himself. Garrick filed a bill against him, and the purchase was declared fraudulent, and set aside with costs.

I must here observe, that you cannot, even at an auction, purchase any property for yourself of which you are a trustee for another. If, however, the person for whom you are a trustee is, what we lawyers term *sui juris*, that is, of legal capacity to contract for himself, he

may certainly sell to you, but you must first, with his assent, shake off your character as a trustee, and you must freely disclose to him all your knowledge of the property. For the rule is, not that you may not buy from the person for whom you are trustee, but that as a trustee you cannot buy from yourself. And in all cases of this nature equity looks with a very jealous eye on the transaction. The same rule forbids an assignee of a bankrupt to buy the bankrupt's estate himself, without at least the consent of the majority of the creditors; and it has even been thought by high authority that the consent of *all* the creditors is absolutely requisite. The rule applies equally to commissioners of bankrupt, agents, and auctioneers. Your solicitor may buy of you, but I should advise him not to do so; and if he do, another solicitor should be *bonâ fide* employed by you. Unless there is perfect fair-dealing, and the dealing is, as it is termed, at arm's-length, it would not be allowed to stand.

I may here notice a case which will probably happen to you. Under your settlement, on your first marriage, you are tenant for life, with a power to sell or exchange the estate with the consent of your trustees; and under the settlement on your second marriage, you are tenant for life of another estate, with a similar power, only it is to be exercised by the trustees with your consent. Under similar powers, many tenants for life, with the concurrence of the trustees, formerly bought the estates, or took them in exchange for some of their other estates of equal value; and after great doubt in the profession on the point, it has finally been determined that such sales and exchanges are valid. You may, therefore, if you should be so desirous, deal with your trustees under either of your powers.

If you purchase an estate, and take a conveyance of it in the name of a stranger, as the real purchaser, although you have no declaration of trust from him, yet you will be entitled to the estate if it can be proved that it was paid for with your money. If, however, you deliberately declare, although verbally, that the purchase was made for the man's benefit, he will be entitled to retain the estate as his own. And if you take a conveyance in the name of one of your children, for whom you have not made a provision, without declaring him a trustee for you, the consideration of blood between you will fix the estate in the child, although illegitimate, for his own benefit; nor can you defeat his claim by any *subsequent* declaration of your intention. The same rule applies to a purchase in the name of your wife, or of a grandchild, if its parent is dead. But all purchases of this kind are open to much objection. If you intend the conveyance to be for the party's own benefit, it should be expressly declared to be so on the face of it. If, on the contrary, you mean it to be in trust for yourself, the trust should be declared by the deed, or you should take a declaration of trust by a separate instrument.

If you and another purchase lands, and advance the money in equal portions, and take a conveyance to yourselves and your heirs, the survivor will take the whole estate; for the purchase would be considered to be made by you jointly of the chance of survivorship, which may happen to the one of you as well as the other. But where the proportions of the money are not equal, and this appears in the deed itself, the rule is otherwise, and the survivor will be a trustee for the representatives of the other, in proportion to the sums which you severally advanced. However, even where the money is advanced equally, you should never take a conveyance in this way;

but the estate should be conveyed to you and the other purchaser in moieties. There is no relying on the joint-tenancy: the other party may defeat it by a secret deed, which, if you survive, will be produced, and his heir will be entitled to his share; whereas, if he survive, he will keep it back, and claim the whole estate.

I must still observe, that in all cases of joint undertaking or partnership, although the estate will belong to the survivor at law, yet in equity he will be a trustee as to the share of the deceased partner for his representatives; so that if you and another were to take a building-lease jointly, and lay out money in erecting houses on the land, the survivor would be compelled to assign a moiety of it to the representatives of the deceased.

If you and another are in treaty for the purchase of an estate, and you agree to desist, and permit him to go on with the intended purchase upon his promising to let you have a part of the estate, you should require a written agreement from him; for it seems, that although he should get the estate, he would not be bound by a mere parol or verbal agreement to convey part of it to you.

LETTER VII.

THE present Letter concerns you both as a Buyer and Seller.

Generally speaking, a *written* agreement is essential to a valid contract for the sale or purchase of an estate. This is required by the statute of 29 Car. II., cap. 3, usually called the Statute of Frauds; and it must be signed by the party whom you wish to be bound by it, or his agent, to whom a verbal authority for that purpose will be sufficient; and the agreement must distinctly contain all the terms, such as the names of the parties, the estate to be sold, and the consideration to be given for it; nothing can be supplied by parol evidence. There are, indeed, some exceptions to this rule in equity —If the party resisting the contract admit the agreement, and do not claim the benefit of the statute, or if he have acted fraudulently, equity will compel the fulfilment of the agreement, although merely verbal, and not reduced to writing, and signed by the parties. As an instance of what is deemed a sufficient fraud to enable equity to relieve, I may observe, that if you were verbally to sell me an estate, and I in performance of part of the agreement were to lay out money in repairs, you could not afterwards resist my claim to a conveyance of the estate.

Letters which have passed between parties have frequently been held to amount to an agreement; therefore, in writing about the sale or purchase of an estate,

you should always cautiously declare your offer or proposal not to be final, lest the other party should entrap you, against your intention, into a binding contract. If upon a treaty for sale of your estate, you should write a letter to the person wishing to buy it, stating that if you part with it, it shall be upon such and such terms (specifying them), and such person, upon receipt of the letter, accept the terms mentioned in it, your letter will be deemed equivalent to an agreement. So, if you are in company, and make offers of a bargain, and then write them down and sign them, and the other party—that is, the person to whom the offer is made—take them up and prefer his bill against you, the proposal will be binding on you. But if it appears that, on being submitted to any person for acceptance, he had hastily snatched it up, and refused you a copy of it, or if, from other circumstances, fraud in procuring it may be inferred, it seems, that in case of an action, it would be left to the jury to say, whether you intended it at first to be a valid agreement on your part, or as only containing proposals in writing, subject to future revision; and if the aid of equity be sought, these circumstances would have equal weight with the Court. In every case it must be considered whether the note or correspondence import a concluded agreement: if it amount merely to treaty, it will not sustain an action or suit, and a letter must, like a regular agreement, contain all the terms. And the answer must be a simple acceptance, without introducing any new stipulation or any exception. If the answer were, for example, an offer of a less sum, the original offer would no longer be binding, and the other party could not revive it by submitting to pay the price at which the offer was made. An offer to sell may be recalled or modified at any time

before it is accepted, and an offer to purchase may, of course, in like manner, be recalled or modified. Although the offer is left open for the acceptance of the other party for a period named—for example, fourteen days—yet it may be retracted at any time before the fourteen days, if the other party have not already accepted it. If the acceptance is sent by letter by post, it will be binding on the writer, although the other party do not receive it till the day following. If even the writer were to die on the same day after he had posted his letter, the acceptance would be binding, it seems, on his representatives.

A receipt for the purchase-money, if it contain the terms, will be a sufficient agreement. And even a letter to your attorney, stating the terms, and directing him to carry the agreement into execution, will have the same operation.

It is not, however, sufficient that a person present at the making of the agreement reduced it into writing, unless it was signed by the parties; nor is the delivery of rent-rolls, particulars of the estate, abstracts of title, &c. on the treaty for sale, equivalent to an agreement; neither is it sufficient that both parties verbally direct an attorney to prepare the conveyance: with the exceptions before alluded to, there must be an agreement signed by the *party to be charged;* that is, by the party against whom relief is sought; for if you sign an agreement to sell or buy an estate, the other party acting *bonâ fide* may proceed against you, although he himself never signed it. You should always require the party with whom you deal to sign when you do.

I may observe, that the price to be paid for the estate is not weighed in very nice scales. As the rule now stands, the consideration must, indeed, be grossly inade-

quate or unreasonable to enable equity to refuse its aid; and at law, unless it is merely fraudulent and nominal, the amount of the consideration would not prevent the party benefited from recovering damages for a breach of the contract by the other party. But fraud is an exception to every rule. A case arose, where an agreement was made for sale of land at a halfpenny per square yard. The price was in all about £500; the real value £2000. The purchaser went out to an attorney, got him to calculate the amount, and desired him not to tell the vendor how little it was; then carried the agreement to the vendor, and prevailed on him to sign it immediately. The desire of concealment was considered such a fraud as would avoid the transaction, because parties to a contract are supposed, in equity, to treat for what they think a fair price.

But I must remark, that the case of an heir selling his expectancy stands on its own grounds, and very slight circumstances will enable equity to set aside the contract. It has been laid down, that the heir of a family, dealing for an expectancy in that family, shall be distinguished from ordinary cases, and an unconscionable bargain made with him shall not only be looked upon as oppressive in the particular instance, and therefore avoided; but as pernicious in principle, and therefore repressed. There are two powerful reasons why sales of reversions by heirs should be discountenanced; the one, that it opens a door to taking an undue advantage of an heir being in distressed and necessitous circumstances, which may, perhaps, be deemed a private reason; the other is founded on public policy, in order to prevent an heir from shaking off his father's authority, and feeding his extravagancies by disposing of the family estate.

But a *bonâ fide* purchase at an auction, of a reversion, cannot now be impeached.

Never leave the price to be fixed by surveyors or arbitrators; for if they refuse to value the estate, or disagree in the valuation, you cannot enforce the performance of the contract. This, however, is not the case where it is merely agreed that the estate shall be taken at a fair valuation, without specifying the mode in which it shall be made. But even this mode is objectionable.

If upon the purchase of an estate you pay a deposit, and afterwards become entitled to a return of it, because the seller cannot make a title, you would not be compelled to take any stock in which he may have thought proper to invest it without your consent. And your assent will not, it seems, be implied from notice having been given to you of the investment, to which you did not reply. It would not, however, be prudent to be silent in such a case. Where the deposit is considerable, and it is probable that the purchase may not be completed for a long time, it is for the benefit of both parties to enter into an arrangement for an investment of the deposit, so as to make it productive of interest.

You cannot, as a purchaser, because delays arise, deposit your money at a private banker's, or in the Bank of England, or convert it into stock at the risk of the seller; notwithstanding such a deposit, the principal will remain entirely at your own risk; nor is it material that you gave the vendor notice of the deposit, unless he took the risk on himself, by agreeing to accept it as a payment. And as he would not be bound, without his express assent, by a deposit, he could not, unless he had bound himself, claim any benefit by a rise in the funds. So if you sell out stock to answer the purchase-money, and the title prove bad, without any fraud in the

seller, and then you re-purchase at a loss, you are not entitled to any allowance on that account, for you had a chance of gaining as well as losing by fluctuation in the price of the stock.

Continual disputes arise as to *interest*. The purchaser is entitled to the profits of the estate from the time fixed upon for completing the contract, whether he does or does not take possession of the estate; and as from that time the money belongs to the vendor, the purchaser will be compelled to pay interest for it if it be not paid at the day. Upon this rule, no difficulty could ever arise if the purchase-money were not frequently lying dead; in which case it becomes a question upon whom the loss of interest shall fall. The loss must be borne by the party by whom the delay has been occasioned. It seems, however, that although the delay is with the seller, and the money is lying ready, and without interest being made by it, yet notice should be given to him that the money is lying dead, because otherwise there is no equality—the one knows the estate is producing interest, the other does not know that the money does not produce interest; and in all cases, where a purchaser resists the payment of interest, he must show that the money was lying dead, and *bonâ fide* appropriated to answer the purchase. But I would advise you never to let your money lie dead; you can at least lay it out in Exchequer bills; and, somehow or other, each party invariably insists that the other has occasioned the delay.

It has become usual to stipulate, upon a sale by auction, that if the purchase is not completed at the time appointed, *from whatever cause*, the purchaser shall pay interest on the purchase-money. The true meaning of this condition has led to much difference of

opinion on the equity bench. It may be considered to apply to delays caused by the state of the title, or other causes, although the purchaser himself is in no respect in fault, but it would not enable the seller wilfully to delay the completion of the contract, or to be grossly negligent, and yet to claim interest during the delay.

Interest is not payable until the principal is payable, and that is not payable until it is seen whether the contract can be completed. If, therefore, a long delay take place in the completion of a contract, but the lien which the law gives to the vendor, on the estate sold for the purchase-money, has been kept on foot by acknowledgment, interest will be payable on the purchase-money for the whole time it ought to be paid under the contract, notwithstanding the Act of Parliament to which, in Letter XXII., I shall draw your attention, by which interest on such a lien could not in general be recovered for more than six years.

In the case of timber on an estate to be taken at a valuation, interest on the purchase-money will only commence from the valuation, although the interest on the purchase-money for the estate itself may be carried a great way back, because surveyors always value timber according to its present state ; and the augmented value of the timber by growth is an equivalent for the interest from the time of the contract to the making of the valuation.

The usual rate of interest allowed in equity is four per cent ; but in some few cases the Court has given five, because that was the current interest of money ; and to give only four was holding out an inducement to persons to delay the completion of contracts. However, the general rule confines the rate to four per cent.

I may here observe, that as the estate belongs to the

purchaser from the time of the contract, he is entitled to any benefit which may accrue, and must bear any loss which may happen to it before the conveyance. If a house is even burned down, yet the purchaser must pay for it, although the seller permit the insurance to expire without giving him notice. You should, therefore, upon entering into an agreement to buy a house, provide for the insurance of it till the completion of the contract.* Again, if you agree to buy an estate held for lives, and all the lives drop the next day, still you must pay your money. On the other hand, if you purchase a reversion subject to an estate for life, you will be entitled to a conveyance at the original price, although the estate has fallen into possession by the death of the tenant for life. In all these respects our law agrees with the civil law.

If you buy an estate in consideration of an annuity which you are to pay to the seller for life, and he die before the estate is conveyed to you, or even before a payment of the annuity become due, yet you will be

* A word of advice about your Fire Insurance. Very few policies against fire are so framed as to render the company legally liable. Generally the property is inaccurately described with reference to the conditions under which you insure. They are framed by the company, who probably are not unwilling to have a legal defence against any claim, as they intend to pay what they deem a just claim, without taking advantage of any technical objection, and to make use of their defence only against what they may believe to be a fraud, although they may not be able to prove it. But do not rely upon the moral feelings of the directors. Ascertain that your house falls strictly within the conditions. Even having the surveyor of the company to look over your house before the insurance, will not save you, unless your policy is correct. To illustrate this, I will tell you what happened to myself. I have two houses in different parts of the country, both of which open from a drawing-room by a glass-door into a conservatory. The one I had insured, for a good many years, from the time I built it; the other I had insured, for a few years, from the time I bought it, in the same office, when a partial fire broke out in the latter, and I was then told by the office—a highly respectable one—that my policy was void, as the opening to the conservatory rendered it hazardous, and if so, of course both policies had been

entitled to a conveyance of the estate without in fact paying for it. But in a case of this kind, if a payment of the annuity become due before the conveyance is executed, you should cautiously pay it *on the very day;* for a neglect on your part would, it seems, bar your right to the estate if the seller should afterwards die before it is conveyed to you.

I may here remark, that if a man by mistake purchase from another an estate to which he himself is entitled, he may recover back the money which he paid for it.

Questions sometimes arise upon a sale as to timber and fixtures. A condition that a purchaser shall pay for the timber on the estate will include trees considered as timber, according to the custom of the country, although not strictly timber; and where the purchaser is to pay for timber-like trees, even pollards may be considered to fall within the condition. As to fixtures, where nothing is said about them, common fixtures would pass to the purchaser under the common conveyance, without

void from their commencement. I was prepared to try the question, and ultimately the objection was withdrawn, and my loss was paid for. Upon renewing my policy, with some alterations, I actually had some difficulty with the clerk of the company to induce, or rather to force him, to add to the description the fact, that the drawing-rooms opened through glass-doors into conservatories. In treating, at a later period, for a policy with another company, I required them to send their surveyor to look at the house; and the stoves and everything to which objection could be taken were shown to him. The company then prepared the policy, and made it subject to the report made to them by their surveyor, referring to it by date. This report I never saw, and the objectionable stoves, &c., were not noticed. Of course I had the reference to the report struck out, and the policy made correct, but not without some personal trouble. I state these circumstances, to show you how careful you should be. I advise you to look at once at your existing policy. If you have added an Arnot's stove or made any other important change in your mode of heating your house since your policy, or you had at the time of your policy any peculiar stove, &c. not noticed in the policy, you should call upon the company to admit the validity of your policy, by an endorsement on it.

paying any additional price for them, unless an intention could be collected from the conveyance or the contract that the fixtures should not pass.

You cannot safely buy a property where a nuisance upon it exists; for if there be a nuisance there, although the property is in lease, and you cannot remove the nuisance, yet by your purchase you would render yourself liable for it. If the nuisance were created by the occupier after your purchase, you would not be responsible; but if the tenancy were a short one, and you were to renew it with the existing nuisance, you would be responsible. You are not to let the property with the nuisance upon it.

It has long since been laid down by high authority, that if a man has two houses contiguous, and one has a house of office which is separated from the cellar of the other by the wall which keeps in the filth of the house of office, and he sells that house, the purchaser must keep in the filth of the house of office, so that it shall not run in upon the other house. And it would have been all one if the vendor had sold the house with the cellar; then he must have kept the wall of the house of office so as to have kept the filth in, for every man must take care to do his neighbour no damage. If a man erect a house, and a house of office, and the latter adjoin to a vacant piece of ground belonging to him, which keeps in the filth, and then sells the vacant piece of ground, the purchaser, if he would dig a cellar by the house of office, must build a wall to it.

As to drains, where the owner of two or more adjoining houses sells or conveys one of the houses, the purchaser of such house will be entitled to the benefit of all the drains from his house, and will be subject to all the drains necessary to be used for the enjoyment of the

adjoining houses, although there is no express reservation as to drains, for the purchaser bought the house such as it was. Nor could the first purchaser of one of the houses stop up the drains, as against the subsequent purchaser of the other house.

If a man has two pieces of pasture which lie open to one another, and sells one piece, the purchaser must keep in his cattle, so as they shall not trespass upon the vendor. An owner of two adjoining closes, separated by a fence and gate, is of course not bound to keep up the fence and gate, nor does he, by a sale of one of the closes, impose any such liability on himself, or on the purchaser, nor, by a subsequent sale of the remaining close, does he cast any such liability on the later purchaser. There must be some specific contract to bind either party. But a purchaser of land, without any way to it, except over other land of the seller, may by implication be entitled to a way of necessity over the latter.

A man who sells part of his land cannot so deal with that which he retains as to cause what he has granted to risk or fall, but the extent of the support to be left must depend on the circumstances of each case. If a house is sold with all lights belonging to it, and it is intended to build upon the adjoining ground belonging to the same owner, so as to interfere with the lights, the right to build in that manner should be expressly reserved. The purchaser would not be bound by a description of the house, as abutting upon building-ground belonging to the seller.

Without attempting here to tell you how you may exercise your rights of property generally, I may take this opportunity of observing, that in working any mines to which you are entitled, you must take care not to damage the houses above them, for you may not work so as to

destroy the support of the surface. As to water, you may sink a well on your land, and divert by pumps and steam-engines, if you think proper, the underground water, which would otherwise percolate the soil, and flow into the river, although there is on the banks of the river a mill which has been worked by the river for more than sixty years.

LETTER VIII.

I HAVE still some directions to give to you in regard to Cautions upon a Purchase.

Where you purchase any equitable right, of which immediate possession cannot be had — for instance, money in the funds, standing in the names of trustees, in trust for a father, for life, and after his decease for his son; and you buy the son's interest during the father's life-time, you should, previously to completing the contract, inquire of the trustee, in whom the property is vested, whether he has had notice of any encumbrance. If the trustee make a false representation, equity would compel him to make good the loss which you may sustain in consequence of the fraudulent statement. When the contract is completed you should give notice of the sale to the trustee. The notice would certainly affect his conscience, so as to make him liable in equity should he transfer the property to any subsequent purchaser; and would also give you a preferable title to any former purchaser or encumbrancer who had neglected the same precaution. The safest course, however, is to prevail upon the trustee, if you can, to join in the assignment to you, or, if he decline to join, to allow you to endorse on his settlement a memorandum of the assignment to you.

If you should purchase, with notice of the claim of another, although he has not a conveyance, and you actually procure the estate to be conveyed to you, yet you will be bound in equity by the notice; for it is a

general rule in equity that a purchaser with notice is bound to the same extent, and in the same manner, as the person was of whom he purchased. I will give you an instance of this: You know that I have lent Tompson £1000, and that he has agreed to secure it by a mortgage upon his estate. Now this gives me merely an equity, that is, a right to call upon him in a court of equity to execute a mortgage to me. Till that is done the entire ownership at law remains in him. If you should purchase the estate from him before the mortgage is executed, without notice of my loan, you would hold the estate discharged from it; for by the conveyance you would get the legal estate, and by the contract the equitable estate; so that having both law and equity on your side, you would prevail over me who have equity only. For it is a rule, never departed from, that a *bonâ fide* purchaser for a valuable consideration, and without notice, shall not be affected in equity. This has been carried so far, that a purchaser has been allowed to take advantage of a deed relating to the estate, which he stole out of a window by means of a ladder. I could hardly, however, advise you to be so bold at the present day. But in my case, as you have notice of the loan, you would be bound by it, although you procure the legal estate, and equity would accordingly compel you to execute a mortgage to me pursuant to Tompson's agreement. In all these cases, therefore, you should stop your hand.

Notice, I must observe, before payment of all the purchase-money, although it be secured, and the conveyance actually executed, or before the execution of the conveyance, notwithstanding that the money be paid, is equivalent to notice before the contract.

It is not necessary that you should have *express* notice; for instance, in my case it is not essential that

you should actually see and read Tompson's agreement with me; for equity holds many acts to amount to *constructive* notice to a purchaser; and constructive notice is equally binding with actual notice. Against some of these you cannot guard by any precaution; but there is one of which I must warn you. Notice to your counsel, attorney, or agent, would be notice to you, for otherwise, to use Lord Chancellor Talbot's words, a man who had a mind to get another's estate might shut his own eyes, and employ another to treat for him, which would be a manifest cheat. And the same rule prevails, although the counsel, attorney, or agent, be the vendor, or be concerned for both vendor and purchaser. The notice, however, must be in the same transaction, because, as Lord Chancellor Hardwicke observed, if this were not the rule of the Court it would be of dangerous consequence, as it would be an objection against the most able counsel, because of course they would be more liable than others of less eminence to have notice, as they are engaged in a great number of affairs of this kind.

It can seldom happen that your attorney, or agent, has notice of any encumbrance on an estate which you intend to purchase, unless he is employed by the seller as well as you. Attorneys are frequently employed on both sides, in order to save expense. This practice has been discountenanced by the Courts, and is often productive of the most serious consequences; for it not rarely happens, that there are encumbrances on an estate which can only be sustained in equity, and which will not bind a purchaser who obtains a conveyance without notice of them. Now, as I have just mentioned, notice to your agent, although concerned for the vendor as well as you, is treated in equity as notice to you; and there-

fore, if the attorney is aware of any encumbrance, you will be bound by it, although you yourself were ignorant of its existence.

And by employing the vendor's attorney you may even deprive yourself of the benefit to be derived from the estate lying in a register county; the register may be searched and no encumbrance appear; yet if the attorney have notice of any unregistered encumbrance, equity will assist the encumbrancer in establishing his demand against you. I must explain to you that the register counties are Middlesex and York; and all instruments affecting lands in those counties are required by Act of Parliament to be registered in offices kept for that purpose, and they are declared to be binding, according to their priority of registry. But although your conveyance should be duly registered, yet if you had notice of a prior unregistered conveyance, equity would hold you liable to it; for the Acts of Parliament were only intended to give you notice of prior deeds; and if you have notice independently of the acts, the intent of the Legislature is answered.

Another powerful reason why you should not employ the vendor's attorney is, that if the vendor be guilty of a fraud in the sale of the estate, to which the attorney is privy, you, although it be proved that you were innocent, will be responsible for the misconduct of your agent. In one case a purchaser lost an estate, for which he gave nearly £8000, merely by employing the vendor's attorney, who was privy to a fraudulent disposition of the purchase-money.

I may observe, that it has often been under the consideration of the Legislature whether there should not be a general registry throughout England. This plan would entail a great and certain expense on property for a very

uncertain benefit. I have often directed my attention to the expediency of a general registry; and my settled conviction is that it would not be advisable. A general registry wantonly exposes the concerns of all mankind; and, by the negligence of an agent, a purchaser or mortgagee may lose the estate, if the seller or mortgagor fraudulently sell or mortgage to another person whose deed is the first registered; and questions upon the priority of registered deeds often lead to litigation. The expense of registry is considerable; and if register-offices were once established throughout the kingdom, with all the patronage annexed to them, they never could be got rid of, however objectionable they might prove, without at least the country's paying a heavy compensation for the loss to the officers in possession. If the law made every unregistered deed void, it would be as mischievous a law as ever was passed. No registry act has yet gone beyond the purpose of protecting purchasers who register their deeds *against prior deeds not registered.* No law can impart activity and intelligence to idle and ignorant persons; and therefore many clients would be ruined, without any neglect of their own, by the operation of the proposed law. It has been said, if, under such a law, a man were to purchase and pay for an estate, and his conveyance were not registered within the time prescribed, it would be void. The land therefore would revert to the seller, and he would have back the estate, and also keep the price paid to him. Would this be endured?

It has been said that the disclosure of private concerns can scarcely be insisted on as an objection, in a country where wills, which contain almost exclusively their general arrangement, are rendered public documents. But that this in effect is avoided by adopting a registration

of the substance only. Now the *substance* of men's deeds is precisely what they wish to keep secret. Dead men's wills cannot be compared to living men's deeds. It is one thing to know what I possess under a will, and another how I dispose of it. Mere curiosity, I am told, constantly leads great numbers of persons to take the trouble—and a great labour it is—to inspect the wills at Doctors Commons. If, again, all deeds were directed to take effect according to priority of execution, a subsequent purchaser or mortgagee could never be sure that there was not some prior deed which might be registered *after* his, and yet have precedence over it. If, on the other hand, all deeds were to take effect according to priority of registration, the *delay* of a prior purchaser or mortgagee might, by rendering void his deed, prove highly advantageous to a subsequent purchaser or mortgagee. The register would never show the existing state of encumbrances on an estate by which a purchaser or mortgagee would be bound, unless priority of registration were the rule, and that very rule would place many men's property for a time in jeopardy. A register would not work well without maps, and they would cost at least two millions, and the number of deeds requiring registry would destroy the plan by its own weight. These and other reasons, after many vain attempts to pass a bill for establishing a general registry, have at length prevailed, and it seems to be universally admitted, that such a plan cannot be established. But a new plan is now on foot, which would ultimately require every man's estate to be placed on the register, and in most cases in the name of a nominal owner ; in effect a trustee who might at law, at any moment, mortgage or sell the estate for his own benefit, and abscond with the money. The object is to facilitate sales, and to render it as easy to sell an estate as

to sell a hundred Three per Cents ; but landowners will hardly consent to divest themselves of the legal right to their own estates, and leave themselves at the mercy of a trustee, although they are assured that they may issue a distringas against him, to prevent him from making a fraudulent mortgage or sale, and so eventually be driven into a Chancery suit. The expense of a registry would be enormous, and would in truth be a new burden on the land.

This, however, is not the place to discuss this important measure. In lieu of it, I propose a law which, by removing various obstacles in the way of purchasers, would greatly facilitate the sales of estates, and yet leave the owners, as they now are, the legal holders of their property;* and a law, for which I am responsible, has brought into one office, where every book may be searched for one fee of 1s., all judgments and other charges (other than by deeds or wills) by which a purchaser can now be affected. This was a great boon to purchasers, and therefore to sellers also.

Whilst I am writing to you, the Lord Chancellor has brought in, or rather there is now circulated, an important bill which, like mine, would relieve purchasers from

* The bill was read a second time in the House of Lords last Session, but merely to give time for the consideration of it. The objects are, 1. To restrict the time allowed for the creation of executory devises ; 2. To make thirty years instead of forty years an absolute protection to purchasers ; 3. Not to bind a purchaser by any judgment, or the like, against the seller, upon which execution has not issued ; 4. To relieve him from liability on account of any *lis pendens* of which he had not express notice ; 5. To make express notice to a purchaser alone binding on him ; 6. To relieve him from the liability of seeing that the succession-duty has been paid ; 7. To render a purchaser no longer liable to see to the application of the purchase-money ; 8. To make a seller liable to produce a title for thirty years only ; and, 9. To make vendors, and their solicitors and agents, criminally responsible for concealing encumbrances or falsifying pedigrees.

judgments upon which execution has not issued, but its principal object is to give a new and powerful operation to charges on land, registered as directed, and to make the registry of them notice to every one.

One great complaint at the present day, is the necessity of carrying back abstracts of title for sixty years. This period I hope to persuade the Legislature to shorten. But still the want of confidence is frequently, nay, constantly, the cause of the expense upon every occasion of examining a long and complicated title: for if I bought an estate ten years ago, which I am now offering for sale, and then had the title sifted by competent counsel, with the aid of an equally competent solicitor, and have the opinion of the counsel, and the result of the searches to show to the new purchaser, it might be supposed that, upon proof of the title since the purchase, and of my undisturbed possession from that period, the title would be deemed satisfactory. But no such thing. Upon every occasion the early title is again submitted to counsel, not more learned with the aid of solicitors, not more competent than those before employed, and this causes that repetition of expense of which both sellers and purchasers so much complain, but which really is not necessary in the great majority of cases, if men would but place reasonable confidence in those who advised the seller (always presuming them to be competent persons) upon his purchase.

LETTER IX.

As you are anxious to obtain Church preferment for one of your sons, I shall state to you how far you may legally buy it. The great object is to steer clear of *Simony*, which is a corrupt contract for an ecclesiastical benefice. It derives its name from Simon Magus.

It is clear and direct simony to purchase a presentation whilst the living is vacant; but the great probability of a speedy vacancy is immaterial if the purchase be not corrupt. It has been held, that although the incumbent is on his deathbed, and it is uncertain whether he will live over the night, a man with full notice of this circumstance may safely purchase; and that the death of the incumbent the next moment will not impeach the validity of the transaction. A man may purchase, whilst the living is full, the next or any other presentation; and he may purchase the *advowson*, either whilst the living is full, or even during its vacancy; but in the latter case the presentation could not be obtained by the purchase of the advowson, for the avoidance cannot be granted, because it is against public utility, and opens a door to simony. But although the avoidance does not pass in such a case, yet if the purchaser of the advowson usurp the right of presentation, the offence of simony will be committed.

But a man cannot purchase a presentation, even whilst the living is full, with an intent to present a particular person, and afterwards legally present him; it is even doubtful whether such a purchase and subsequent pre-

sentation can be legally made by a father for his child. And where the living is vacant, if the *advowson* is purchased with a corrupt view for presenting, that may avoid the purchase. And therefore if you purchase a presentation, or an advowson, whatever your intentions may be, you should not disclose them.

A clergyman is prohibited from buying a presentation for his own preferment, but he may purchase the advowson itself, and upon a vacancy cause himself to be presented.

Where a man has an advowson, and is desirous to present a particular person—for example, one of his sons —and a vacancy happen before he is capable of filling the living, it has been usual to present some person, who gives a bond to the patron to resign when the person for whom the living is ultimately intended shall be of age to receive it. This is a case which is very likely to happen in your family. *General* bonds of resignation were formerly very common, by which the incumbent became bound to resign the living at any time upon the request of the patron. Such bonds had repeatedly been held to be legal, but equity always interposed, and prevented them from being made an instrument of oppression, or from being used for the commission of simony. In the time of Lord Chancellor Thurlow, however, it was decided in the House of Lords, upon a division 19 against 18, that such bonds are illegal. The Courts, however, did not give up their ancient rule, where the case was not precisely like that determined in the Lords. They held that you might take a bond from the incumbent to reside on the living, or to resign to the ordinary, if he do not return to it within a time to be fixed, after notice, and also not to commit waste; for such a condition only enforces the performance of moral, legal, and

religious duties. So that you might make it a condition that he should keep the buildings in repair, and that he should resign upon notice, in order that one of your infant sons might be presented to the benefice. But the rigid rule was again established in the House of Lords; in consequence of which an Act of Parliament was passed (9 Geo. IV., c. 94), which validates engagements thereafter to be made for resignation, to the intent that any one person, or one of two persons to be specially named, shall be presented, but which engagement is to be entered into before the presentation or appointment of the party entering into it. And it is provided, that where two persons are named, they shall be, either by blood or marriage, an uncle, son, grandson, brother, nephew or grand-nephew of the patron, or of any married woman whose husband in her right shall be the patron. And certain regulations are enjoined as to the execution and deposit of the deed, in order to prevent fraud.

I do not think it necessary to point out to you the forfeitures and punishments which are incurred by simony. They are very heavy, and yet are not sufficient to deter men from every day committing the crime which they are intended to punish.

You ask me about the propriety of purchasing your land-tax. If you are likely to build, or otherwise improve your property, it would be advisable first to redeem the land-tax; but if you have no such intention, by buying the land-tax you would simply assist the Government in imposing a new tax on the land, which they will no doubt do as soon as the land-tax is generally redeemed, without regard to the large prices paid by the landed interest for the redemption of the tax, or of the fair

acres which have been severed from estates, or the noble timber felled upon them to raise money for the redemption, and without regard to the heavy impost on land under the Succession Duty Act. In order to induce persons to buy up the remaining land-tax, the price of redemption has been reduced by £17, 10s. per cent below the terms fixed by the 42 Geo. III. c. 116.* It appeared to me that this enactment would enable strangers to buy up the land-tax on other men's estates, which would cause great dissatisfaction. To meet this objection, another act was passed in the same session,† which excludes all persons and corporations from the right to redeem land-tax except those having an interest in the land, and to whom preference in the redemption of land-tax was given for a limited period by the 42d of George III. This protects you from all intruders. But then the Government tacked on to this act a clause that, upon the completion of any redemption, the property shall be wholly exonerated from land-tax, and from any yearly rent-charge in respect of the price. This was a serious alteration of the law, and will lead to some inconvenience. The object, as I have said, was to *extinguish* all the land-tax as quickly as possible. You should keep in view this enactment, which will operate upon every redemption made since the Act, and therefore upon all future ones. You cannot buy the land-tax on your settled estate, and keep it on foot to be redeemed by the person who succeeds you, and to form part of your personal estate; nor can you buy the land-tax on the rectory of which you have the advowson, and keep it alive as a charge for your own benefit. In those, and in all other cases, if you purchase the land-tax, it will by force of the Act become extinguished.

* 16 & 17 Vict., c. 74. † 16 & 17 Vict., c. 117.

If you determine to redeem, you should apply to the Clerk of the Land-tax Commissioners, who will supply you with printed papers containing full directions, and you may at once, if you please, transfer the stock, or pay the money price, so as to save yourself any further trouble, and the contract will finally be delivered you properly executed.

LETTER X.

I HAVE still some directions to give to you about the mortgaging, selling, settling, and devising of your property; but I have not forgotten your request that I would first furnish you with a slight popular sketch, just a notion, of the various ordinary interests which you have acquired or may acquire in real property. Real or landed property is either held in fee or for an estate of freehold, or for a term of years. The fee or fee-simple includes all the interest in the land. A legal anecdote has been transmitted to us from a very early period, where a judge, who indulged himself in the euphonical phrases, "I'd have you to know," and "I'd have you to see," asked a learned serjeant why he had been absent when the Court required his presence. His excuse was that he had been turning the work of *Coke upon Littleton* into verse. The judge called for a sample, which the serjeant thus gravely delivered—

> "A tenant in fee-simple is he
> That need fear neither wind nor weather;
> For I'd have you to know and to see,
> 'Tis to him *and his heirs for ever!*"

I need not point out to you how this estate will descend; your male heirs, as you know, being preferred to the females—the former taking in the order of their birth, the latter all together; but under recent legislation the father and other lineal ancestors are let in in default of lineal heirs, so that the father will be preferred to a brother or sister, and a more remote lineal ancestor

to any of his issue other than a nearer lineal ancestor or his issue; and paternal ancestors are preferred to maternal; and as in both lines males are preferred to females, and the descendants succeed to the line, and the half-blood is no longer excluded, the brother of the half-blood, on the part of the father, will inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half-blood on the part of the mother will inherit next after the mother. As I have explained in a work of an elaborate character, in the common case of a son purchasing an estate and dying intestate, leaving issue, and also having brothers and sisters of the whole blood, and likewise brothers and sisters of the half-blood, on his father's side, his own issue would take according to the old canons of descent; upon their failure the new law would operate, and the father would take in exclusion of all the brothers and sisters and their descendants, who of course would be *his* issue; but after him they would *all* succeed, the whole blood just as if he had never intervened, the sons before the daughters, and the daughters all together; but the children by a different ventre [another wife], that is, brothers and sisters of the half-blood to the purchaser, would be postponed to the children of the marriage from which the purchaser issued—viz. to brothers and sisters of the whole blood, and the issue of the latter would be entitled to a like preference with their parents; and the same rule would prevail in each step of the ascending pedigree. The brothers and sisters of the half-blood, on the part of the *mother* of the purchaser, that is, her children by a different husband, will also inherit; but not until *after* her and she is postponed until *all* the paternal relations are exhausted.

I must explain to you that a fee in an estate may not be a simple one—it may be limited to a particular line of heirs; for example, to a man and the heirs-male of his body, which confers what is termed an estate in tail-male; and male issue, through males, can alone take under it; or to a man and the heirs-female of his body, which gives an estate in tail-female, and to which only females, claiming through females, can inherit; or to a man and the heirs of his body, which vests in him an estate in tail general, and to which sons and daughters and their issue will succeed according to the rules of descent, males and their issue being preferred to females and their issue; and sometimes the limitation is to a man and the heirs-male of his body, or the heirs-female of his body, or the heirs of his body on the body in each case of a particular woman, which regulates the descent accordingly. Any such tenant in tail may now by deed, enrolled in manner required by statute,* bar the estate tail, and any remainders over, and acquire the fee, which he can then dispose of as he thinks proper. If any other person has a previous estate for life, his concurrence, however, would be necessary.

An estate for life, or for another man's life, is termed a freehold, less than an inheritance, but still a freehold; and of course, unless expressly empowered to do so, a tenant for life, or *pur auter vie*, cannot grant any lease or create any charge extending beyond his own interest. I shall in another Letter point out to you the powers of leasing and selling conferred on tenants for life by statute law.

A term of years, for example, a common lease, is called a chattel real, and forms a part of the owner's personal estate, and is not deemed real estate.

* 3 & 4 Will. IV., c. 74, for England; 4 & 5 Will. IV., c. 92, for Ireland.

I have not yet said anything in respect of copyholds; but allowing for the different qualities of the tenures, the observations, generally speaking, already made as to freehold estates, apply to copyholds. And now by statute * provision has been made for converting copyholds into freeholds, and either the copyholder or the lord may now, after an admittance, taking place on or after 1st of July 1853, compel the other to enfranchise, so that, in due time, the copyhold tenure will be altogether extinguished, but the tenant cannot require enfranchisement until after payment of the fine and fees. The enfranchisement will not affect the right of either party to the mines and minerals in the lands enfranchised, or in any other lands, and the tenant will still be entitled to his former commonable rights, although he has obtained the freehold of his land. Where heriots are, by custom, payable to the lord in respect of any freehold or customary land, at any time after any such heriot should be due (on or after the 1st of July 1853), power was given to the lord, or the tenant, to require and compel the extinguishment of all claim to heriots, and the enfranchisement of the land in the same way as if the land were copyhold. The statute, of course, contains full provisions for assessing the compensation or purchase monies. I must, however, refer you to the Act for the various important provisions in it. If, as lord of the manor, you are about to enfranchise other men's copyholds, or, as a copyholder, to obtain the enfranchisement of your own, you should peruse the Act itself.

* 15 & 16 Vict., c. 51, and later statutes.

LETTER XI.

I NOW propose to call your attention to your Wife's Rights in your Property. Your marriage having taken place since the 1st January 1834, your wife will find her ancient right to dower out of your estates of inheritance both enlarged and curtailed by recent legislation. She is no longer hampered by former distinctions between legal and equitable estates; but will be entitled to her dower when the whole legal fee is vested in you, or you have (whether wholly equitable, or partly legal, or partly equitable) what is equal to an estate of inheritance, so that if you were to contract to buy an estate, your wife, *as* between you and your heirs, at your death, would be entitled to dower. On the other hand, the wife's dower is placed wholly in the power of the husband. His absolute disposition in his lifetime, or by his will, excludes her altogether. So his contracts and charges in his lifetime, or by his will, will bind her, and he may, by the deed conveying an estate to him, cause it to be declared that his widow shall not be entitled to dower out of such land, for it is not necessary that he himself should execute the deed, or he may bar her right by his declaration in any other deed, or in his will, either generally or partially. If you give your wife any property by your will, pray take the trouble to state whether you mean it to be in bar of dower or not. Such a precaution may prevent a lawsuit. As to your personal estate undisposed of at your death, of course you know that if there is no issue of the

marriage, your widow will take half of it, and if there is, one-third only.

Now, as to your rights in your wife's property. Upon your marriage, you take in effect, for the joint lives of yourself and your wife, all her real estates. If you have issue born alive, you will become tenant by the curtesy initiate, as it is termed, of the parts of which she has the inheritance, and upon her death, in your lifetime, your estate, by the curtesy, will take effect for your life. In effect from the birth of a live child, you are tenant for life of the property. But there is reason to doubt whether this right by curtesy extends to estates which have *descended* to your wife. This depends upon the legislative alteration in the law of descent, with which I will not perplex you. Her chattels real—that is, leases—you can dispose of as you think proper. If you do not dispose of them in your lifetime, they will survive to her, but a partial disposition of them by you in your lifetime would bind her. You cannot, however, give them away from her by will. If you survive her, your right to them would be absolute. If even her interest in a chattel real be reversionary or contingent only, yet you may sell it, for it has been decided as clear that the wife's contingent legal interest in a term may be sold by the husband, and that there is no difference between the legal interests and the trusts of the term, and therefore your right to sell would prevail, although the legal interest in the lease was in trustees, and your wife had only a reversionary or contingent interest. Whatever you can possess yourself of, or, as the law terms it, reduce into possession, and actually do so, will be your own; for example, if she have any stock standing in her name, you can transfer it into your own name, or into any other person's. Ready money, plate, furniture, jewels, and the like, all vest in

you without any act on your part, and you can dispose of them as you think proper; they are personal chattels in possession. Plate deposited at a banker's would, in like manner, belong to you. But to prevent any question if there is any balance in her name at a banker's, and you wish to make it your own, you had better place it at once, as you have a right to do, in your own name. If any debts are owing to her, you can recover them, and a payment of them to her after the marriage would not bind you. If your wife is entitled to any *chose* in action, as it is called, that is, personal property not in possession, you must wait till it falls into possession, or if you assign it, and she survives you before it falls into possession, your assignment will not bind her; the property will survive to her, and you cannot dispose of it by your will.

If there is any personal property in the names of trustees in which your wife is entitled to a present interest, but which you cannot obtain without the order of a court of equity, she may, if not sufficiently provided for, claim a settlement out of it for herself and her children, and you would take the surplus, and she might herself resort to the Court in order to obtain a settlement out of the fund. If any further personal fortune come to her in the names of trustees, she may, in like manner, claim a settlement out of it, or a further settlement, even if one was made on your marriage, unless it amounted to a purchase by you of all your wife's future acquisitions. The proportion of the fund to be settled on the wife and children in these cases must depend on the position and circumstances of herself and her husband, but the courts are inclined to behave with liberality towards her, and, in extreme cases, would even settle the whole of the fund on her. But she may waive her equity to a settlement

upon a private examination by the Court apart from her husband.

If your wife is tenant for life, or in fee of an estate, she and you can, by deed acknowledged by her, as required by Act of Parliament,* sell or dispose of, or settle it as you both think proper; and if she is tenant in tail, you may together bar the estate tail, and remainders over, and acquire and dispose of the fee-simple as you choose; but she is to acknowledge the deed, which must be enrolled, and she must be examined separately as to her consent, her age, and capacity to understand the act she is performing. She may, by deed acknowledged by her, with your concurrence, dispose of any other interests in land, and destroy or release any powers given to her. And, in certain cases of incapacity on the part of her husband to execute a deed, &c., or where they live separate by mutual consent, or by sentence of divorce, the Court of Common Pleas is authorised to dispense with the husband's concurrence in the disposition of the wife's property.

I must yet give you some information about the rights of property in married women. Both real and personal estate may be settled upon a woman for her separate use, so as wholly to exclude any right of the husband, and such a provision generally enables the woman, although married, to dispose of it by alienation; but this may be, and frequently is, guarded against by an express clause against anticipation, which, during the marriage, effectually prevents any alienation of the fund. A wife having a *separate* estate cannot be compelled to contribute to the family wants, or to maintain her children. Although a married woman with her husband can convey or transfer all her interests in real property, yet neither she nor her husband can deprive her of any

* 3 & 4 Will. IV., c. 74.

interest provided for her out of mere personal estate—funded property for example—to take effect on her husband's death. So that if you provide a portion for your daughter on her marriage, and settle it on the husband for life, and then on your daughter for life, and then to the children, you may feel assured that your daughter will benefit by your bounty on her husband's death. Many attempts have been made in Parliament to take away this security, and to enable the husband and wife to sell her life interest, and so strip the woman of the provision made for her. These attempts have hitherto been successfully resisted, but a partial measure has just been carried, providing that married women may, by deed acknowledged in manner *required by the Act*, with their husband's concurrence, dispose of every future or reversionary interest to which the woman, or her husband in her right, shall be entitled in any personal estate *under any instrument made after the* 31*st December* 1857, and relinquish or release any power she has, or her right or equity to a settlement out of any personal estate; but this power does not extend to any reversionary interest which she is restricted from alienating, nor does it enable her to dispose of any interest in personal estate *settled upon her by any settlement, or agreement for a settlement, made on the occasion of her marriage.**

There is reason to fear that the next step will be an attempt to repeal the exception, and make the power of alienation extend to all interests. Such a power would lead to constant disputes between husband and wife. Upon any pressure, the husband would call upon her to sell her reversion to assist him, and creditors knowing of the settlement and of the power of alienation, would refuse to show any indulgence unless the wife pledged

* 20 & 21 Vict., c. 57.

her reversion for her husband's debts. Many a woman, anxiously provided for by an affectionate father, would be left penniless at her husband's death, when probably her father was no longer alive to assist her. The Act must give great satisfaction to purchasers of reversions, and particularly to companies expressly formed for the purchase of reversionary interests. In making any provision for your daughter by your will, you can guard against the operation of the Act by making the provision inalienable. Of course the observation applies only to annuities, or interests for life, or interests in reversion.

LETTER XII.

As you desire to know something of the new law of Divorce, and as it affects the rights of property, I will now comply with your wish.

A new court, with high judicial officers, is created to adjudicate on divorce and matrimonial causes in England.* Judicial separation is a new term introduced for the old divorce *a mensâ et thoro*. Either the husband or the wife may obtain a judicial separation on the ground of adultery, or cruelty, or desertion without cause for two years or upwards. And such separation, or restitution of conjugal rights, may be granted by the Court, or by a Judge of Assize, or counsel named in the commission, and appointed by him; but any order by a Judge of Assize or counsel may be reviewed by appeal to the Judge Ordinary of the Court. Decrees for judicial separation may, for sufficient cause, be reversed by the Court when obtained in the absence of the party applying.

The Court can direct the husband to pay alimony—that is, an allowance to the wife for her support; and if he do not pay it, he may be sued for necessaries supplied to her. She becomes, after the judicial separation, and whilst it continues, a *feme sole*, a single woman, with respect to property of every description which she

* 20 & 21 Vict., c. 85. It is to come into operation on such day, not sooner than the 1st January 1858, as Her Majesty in Council shall appoint.

may acquire, or which may devolve upon her; and if she die intestate, it will go as if her husband had been then dead. In case of re-cohabitation, the property will continue to be her separate estate, unless some agreement in writing be made between them whilst separate. During the separation she may, as a single woman, enter into contracts, and sue and be sued, and her husband will not be liable for her debts or acts. But they may execute any joint power given to them. I must postpone for a moment stating the other incidents of a judicial separation, whilst I point out to you the cases in which the marriage may be dissolved; and here you will observe that for well-considered reasons the remedies are not reciprocal. The husband may obtain a divorce dissolving the marriage upon the simple fact of his wife's adultery. The wife can obtain such a divorce only where the husband has been guilty of incestuous adultery, or of bigamy with adultery, or of rape, or of foul crimes—for which I must refer you to the statute, and the insertion of which I endeavoured in vain to keep out of the statute—or of adultery coupled with such cruelty as would have entitled her to a divorce *a mensâ et thoro*, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards. If the case is proved, and the Court shall not find that the petitioner has been in any manner accessory to or conniving at the adultery of the other party to the marriage, or has condoned (or forgiven) the adultery, or that there is collusion with either of the respondents, the marriage is to be dissolved by decree. But the Court is not bound to pronounce such decree (observe, it is not said that the Court may not) if it shall find that the petitioner has, during the marriage, been guilty of adultery, or of unreasonable delay in seeking redress, or of cruelty

towards the other party, or has deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery. This provision, therefore, applies equally to the husband and wife. The petition will be *dismissed* if the petitioner has been accessory or conniving at the adultery of the other party, or has condoned (or forgiven) the adultery, or there is collusion with either of the respondents.

The Court has power to make interim orders for payment of alimony for the wife, and ultimately to suspend the divorce until the husband has made a proper provision for her.

The husband must, it seems, in every case make the alleged adulterer a co-respondent to his petition, unless the Court excuse him. The wife, in applying for a *dissolution* of the marriage, may be ordered to make the person with whom the husband is alleged to have committed adultery a respondent. Any of the parties may insist upon having the contested matters of fact tried by a jury. In *every* case, the petitioner must by affidavit verify the facts so far as he or she is able to do so, and deny collusion. And the Court may examine *the petitioner*—husband or wife—on oath; but they are not bound to answer any question tending to show that he or she has been guilty of adultery.

There are some important remedies applicable to *all* cases. As to children, the Court may make such interim or final orders as it may deem just, with respect to their custody, maintenance, and education, and may direct them to be made wards of the Court of Chancery. This is interfering with a strong hand with the parental rights of the father. Where the wife is the guilty

party, the Court may order a settlement of her property, either in possession or reversion, for the benefit of the innocent party, and of the children of the marriage, or any of them. This is as powerful an interference with the wife's right of property.

When a decree for dissolving the marriage has become final, the respective parties may marry again as if the prior marriage had been dissolved by death. But no clergyman of the United Church of England and Ireland is compellable to marry any person whose former marriage has been dissolved on the ground of his or her adultery. But in case of his refusal, when but for such refusal the persons would be entitled to have the service performed in his church or chapel, the minister is to permit the marriage to be solemnised in his church or chapel by any other minister in holy orders entitled to officiate within the diocese. The right to marry again could not in my opinion have been denied to the parties, although it was strongly opposed, and is still objected to by a body of the clergy. The desire not to impose upon the clergy a duty which might be contrary to their conscientious feelings, induced the Legislature to excuse those who objected from performing the marriage ceremony, thus making a law which of course was not deemed inconsistent with the laws of God or man, and yet excusing the clergy who were to give effect to it from obeying it — a dangerous precedent, and the exemption has not given satisfaction to the class in whose favour it was introduced. The substitute provided, where a clergyman declines to officiate, is well calculated to lead to disunion between neighbouring clergymen, and ought, as it appears to me, never to have found its place in our statute law.

A remedy has been provided for the heartless cases of

desertion by a husband of his wife, and then returning only to rob her of her miserable earnings—and this has been made general, so as to include cases where the deserted wife has, by her literary talents for example, acquired considerable property during the desertion. This protection covers all her earnings and property acquired since the desertion, as if she were a single woman, and binds her husband and his creditors, and any person claiming under him. It is to be granted by a police magistrate, if she is resident in a metropolitan district, or, if she is resident in the country, by justices in petty sessions, or in either case by the Court of Divorce. It is required to be shown that the desertion was without reasonable cause, and that she is maintaining herself by her own industry. The order may be reviewed or may be appealed from, but if disobeyed, the wife may recover the specific property, and also double its value. Whilst the order for protection continues, the wife is to be considered as invested with the same rights, and as subject to the same liabilities, as if she had obtained a decree of judicial separation.

Finally, on this head, the action of *crim. con.*, that disgrace to the nation, has been abolished; but, by an unpardonable mistake in legislation, this is accomplished in words only, whilst in effect—indeed in words equally plain—a similar right of action is given to the husband, through the instrumentality of the Court, but to be tried by a jury like the old action, in the case of a petition for either a dissolution or a judicial separation, or even limited to the object of damages only; and the wife is also to be served with the petition, unless the Court order otherwise—thus really increasing the evil; for a divorce formerly could not in general be obtained without damages had been recovered, and that circumstance was

always relied upon as an excuse for the husband's demand of a pecuniary compensation, whereas now he may go for damages, although he profess an intention not to ask for a divorce. The damages, however, are not to belong to the husband, but the Court is to direct in what manner they are to be applied, and to direct that the whole or any part shall be settled for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife, and the adulterer may be fixed with the costs of the proceedings in the Court of Divorce. All were ultimately agreed that the old action should be discontinued, and none proposed that the adulterer should not pay in the shape of damages, but many wished no part beyond the expenses to go to the husband, but rather that it should fall into the Consolidated Fund. The measure, as it stands, was not passed without a severe struggle. It is not carefully framed, and is wholly inconsistent with the general enactment abolishing the action. A man may now recover damages for his wife's infidelity without seeking for a divorce, but may continue to live with her upon the damages recovered from her paramour, which may be settled upon her or upon the children! Even when a divorce is obtained, the damages may be settled upon the children of the marriage, and the father may live with his children, whilst they are maintained and educated with the price of their mother's dishonour! It may well be doubted whether this is an improvement of the old law, and whether we have freed ourselves from the reproach of foreign nations—that we consider a money payment as the proper consolation to a husband whose wife has proved unfaithful to him.

You are aware that, independently of the Act, husband and wife may, by mutual agreement, live separate and

apart under a deed with formal stipulations as to maintenance, the contracting of debt by the wife, against which some relative usually covenants to indemnify the husband, and other usual stipulations; but such a deed does not in law dissolve the marriage, and the restitution of marital rights would be enforced if sought for. Our law forbids any provision to be made, either before or after the marriage, for a *future* separation between husband and wife. It was attempted in the late Act to make a separation by consent of husband and wife as operative as a divorce *a mensâ et thoro*, or what is now termed a judicial separation; but it did not succeed.

LETTER XIII.

You have already seen that the Court of Divorce has power over the children of the marriage where a judicial separation or a divorce takes place. But this is not the only instance in which a father's power over his children is interfered with. A remedy is afforded by statute* to mothers where their husbands deny them access to their infant children, or withhold from them the care of those under seven years of age. The authority is given to the Court of Chancery, who, on the mother's petition, may, as well in the father's lifetime or after his decease, as against the guardian appointed by him, make such order as may seem fit for the access of the mother to such infants at such times, and subject to such regulations as may be deemed just and convenient; and if such infants are under seven years of age, to order them to be delivered to and to remain in the custody of the mother until attaining such age, subject to such regulations as shall be deemed convenient and just; but these provisions do not extend to a mother against whom adultery has been established. As Lord Cottenham observed, the object of the Act was to protect mothers from the tyranny of husbands who ill-use them; it gives the Court the power of interfering when the maternal feelings are tortured [by the threat to take their children from them or to deny them access to them], for the purpose of obtaining anything like an unfair advantage over the mother.

* 2 & 3 Vict., c. 54.

Besides these statutory powers, the Court of Chancery, in exercise of its own jurisdiction, will take the custody of his children from a father on the ground of his impiety and irreligion, or of his profligacy, adultery, and profaneness, it being both the right and duty of the Court to remove the children from the contamination to which they would be exposed from such examples; but there must be sufficient property to educate and maintain them, either belonging to them, or found by their friends for them, as the father cannot be compelled to pay for their maintenance or education.

Subject to these powers, the father alone has a right to the custody of his children, and he can by deed or will appoint a guardian to them; but although from the time of Charles II.* until a recent period an infant might have appointed a guardian to his children by deed or will, yet it seems that he can no longer do so by will.† The adult father's will must be executed like all other wills, which will be the subject of a future Letter. The mother cannot appoint a guardian, although she survives her husband. Where it is necessary after the father's death, the Court of Chancery will appoint a guardian; and the Court will, if necessary, although reluctantly, interfere with the testamentary guardian appointed by the father, but the mother as such has no right to interfere with a testamentary guardian. Generally speaking, the child should be brought up in the religious faith of the father, but he cannot by his will regulate the faith in which his child should be brought up; the Court will pay great attention to the expression of his wishes, and he can exercise that power indirectly by appointing a guardian of the faith which he professes. If the father make no appointment of a guardian, the mother,

* 12 Charles II., c. 24. † 1 Vict., c. 26.

after his death, is the guardian by nurture until the age of fourteen.

The Queen's Bench recently ordered a girl under fourteen years of age, the daughter of a deceased Protestant father, to be delivered to the mother, a Roman Catholic, by the mistress of a Protestant school, where she was provided for out of the Patriotic Fund; and the Court refused, contrary to some precedents, to examine the child, who was between ten and eleven years of age, as to her religious belief, or on any other subject; and so powerful was the mother's right deemed, that it was considered to be no objection that she intended to educate her child as a Roman Catholic, although the girl had been baptised as a Protestant, and had been placed at the Protestant school, upon the mother's application, after her husband's death, and remained there for some time, and had previously been to other Protestant schools as well during her father's lifetime as since his death, which had impressed upon her mind strong religious convictions, and she refused to become a Roman Catholic. But upon a small settled provision being provided by third persons for the child, who was made a ward of the Court of Chancery, the mother being unable to maintain her, the Court replaced her at the school. The Judges in Equity do not hesitate to see and examine the child, not with a view to consult the child's wishes, but to ascertain what religious impressions have been made upon the child's mind.

Where a posthumous child of a Roman Catholic father and mother was baptised as a Roman Catholic, and his uncle and aunt (a Roman Catholic peer and his wife) were his godfather and godmother; and the mother, after her husband's death, became a Protestant, and brought up her son as a Protestant until he was

nearly ten years of age, when the Roman Catholic relatives interfered, the Judges in Equity did not doubt that if the application had been made at once it would have been of course that the child should have been brought up in his father's religion; but they had seen him, and were satisfied that he had received strong impressions adverse to his father's faith, and that to disturb them would expose the child to danger. The mother, therefore, was left as sole guardian, and, consequently, the boy would continue to be brought up as a Protestant. You should bear in mind, that as children may now lawfully be brought up in the Roman Catholic faith, the *same principle* would have been applied if all the parties had been Protestants, and the mother, after her husband's death, had become a Roman Catholic, and had educated her boy in that faith, which course, therefore, the Court would not have disturbed.

There is, as you will have perceived, a distinction between the jurisdiction upon a *habeas corpus*, where a judge looks principally to see whether the father or mother has acted towards the child cruelly or with personal ill-usage, as the ground upon which he can deny to a father, or to a mother where she is entitled, the custody of a child and the jurisdiction of a court of equity, for where the child is a ward of that court, many other considerations may have weight; for example, the father's acquiescence in the application of a gift to the child by a third person for its maintenance and education, in which case the Court may enforce his further submission.

I may still mention to you, that by the Poor Law Amendment Act,* every man who has married since the 14th of August 1834, or shall hereafter marry a woman

* 4 & 5 Will. IV., c. 76.

having any children at the time of the marriage (whether legitimate or illegitimate), is bound to maintain such children as part of his family until they attain the age of sixteen, or until the death of their mother. An attempt was made, but was defeated, to carry this much further, by making a woman who survived her husband liable to provide for his children by a former marriage. A married woman, although having separate estate, and living apart from her husband, cannot, as we have seen, be compelled to contribute towards the maintenance of the children, unless there has been a judicial separation or divorce.

Lastly, I must tell you that, if you enter upon an estate belonging to any of your children, you will be considered as entering as his guardian, and you will be accountable for the rents received by you. Therefore your possession would not be deemed adverse to your child's right; and consequently, if you withheld the possession, the child would in any view have twenty years within which to recover his property from you after he attained twenty-one. But indeed the Courts would not permit *any* guardian entering as such afterwards to set up a title by non-claim against his ward. A person in possession of an infant's estate at the death of his father or other ancestor, claiming adversely, can, however, only be dispossessed by the common process at law.

LETTER XIV.

MORTGAGES are the next subject to which I shall direct your attention.

A *mortgage* is a security for money lent. The borrower is styled the *Mortgagor*, the lender the *Mortgagee.*

If you lend money on mortgage, you should take care to have a good title and property in pledge of sufficient value, and a borrower of character, for, however good the security, if he be a bad paymaster you will find it difficult to obtain your interest regularly. The title will, of course, be investigated by counsel, and you must depend on the judgment of others as to value. In several instances, solicitors have had to indemnify their clients for having lent their money on insufficient security. But this can hardly happen except in small loans on houses, or so-called ground-rents, or the like. A solicitor is, of course, not answerable for the value of the estate pledged, unless he render himself liable by his conduct, for it does not fall within his province to value estates. You are not likely to advance money on mortgage to speculative builders, or the holders of house property. It is not usual to lend more than two-thirds of the value of the property. Never advance money upon a second mortgage that is subject to a prior mortgage in another person. It is not a satisfactory security, and you may be compelled to redeem or pay off the first mortgage, or actually lose your own security. If you do advance money on mortgage of buildings, take care to have them insured in your name. If, however, they are

leasehold, you should ascertain that such an assurance, if the only one, would not be a forfeiture of the lease under which they are held.

Pay the money yourself to the mortgagee, and see the deed executed. Do not pay the money to the person bringing the deed, although executed and the receipt signed, unless by the written authority of the borrower; for the mere possession of the deed by the solicitor or agent, will give him no authority to receive the money. It is not safe in all cases to rely on mortgages apparently duly executed, and brought to you by the regular man of business of the borrower, to whom it has been delivered by your solicitor to get it executed by his client the borrower. Unhappily, I have known more instances than one of forged mortgages having been delivered to an unsuspecting lender. In one case, the lender and his solicitors were assembled, waiting for the mortgage deed, which was to be brought duly executed by the solicitor of the supposed borrower, who was confined to his bed by illness; and at length tired with waiting, a messenger was just being despatched to the supposed borrower's house, when the solicitor, who had evidently been delayed in concocting the forged deed and its attestations, arrived with the deed executed and attested, and received the money. He escaped detection at the moment, but ultimately left the country. The lender, of course, lost his money. These instances will make you cautious, but will not lead you to suspect men of character and reputation. It is advisable to keep your own securities in your own deed-box at home, for the same persons who forged mortgages forged also transfers of mortgages, and delivered up the deeds to the new lender; an act which was facilitated by the possession of the mortgage deed. The forger, of course, continued to pay interest regularly

to the first lender. In one remarkable case the agent acted for two persons, and he actually mortgaged the property of one to the other by a forged instrument, and although he and these two persons frequently dined together, the forgery was not discovered till the guilty party was wholly ruined. The lender did not like to talk about the mortgage, and was not called upon to do so, as the interest was regularly paid by the agent, and the supposed borrower was, of course, silent on the subject. Upon a mortgage the title is, of course, investigated by the lender's counsel, and the mortgage is prepared by his solicitor, but all the expenses are paid by the borrower.

But you may borrow as well as lend. As a borrower, bear in mind that you will have to pay all the expenses of the loan, and that in case you do not pay the interest regularly, the mortgagee may compel payment of the principal and interest. You will always be in danger of the mortgagee calling in the money, and thus putting you to the expense of obtaining money elsewhere to pay him off, and of making a transfer of the mortgage to the new lender. You should inquire whether the lender is likely to want his money, or is in the habit of changing his securities. To avoid this danger, it is sometimes stipulated that the lender shall not call in the money for a given number of years, provided the interest is regularly paid; but in that case the lender will probably require an obligation from the borrower not to pay the mortgage off within that period.

The statutes against usury, which prohibited the reserving or taking more interest than £5 per cent per annum, are repealed, so that you may take for your money whatever amount of interest you can get. It is useless now to consider the policy of the measure. Theo-

retically no one can deny that the rate of interest should be left to be regulated by the lender and borrower, but experience convinced many persons that a total repeal of the usury laws was not a safe measure. Whilst the prohibition lasted, 5 per cent was popularly called the natural rate of interest. Habit and the general market rate of interest still induce capitalists to advance money on good mortgages, as a permanent investment at 5 per cent. Under the old law you could not prospectively make interest principal, so as to carry interest; therefore a stipulation in a mortgage-deed that every quarter's interest in arrear should become principal, and carry interest, would have been void. But as there is no restriction on the amount of interest which may be received, such a stipulation would, I suppose, now be held valid. But a liberal lender would hardly require such a provision, and none but a needy borrower would submit to it. The relation of mortgagor and mortgagee should always be one of fair dealing and confidence. After the interest has become due, it of course may, by a regular charge of the mortgagor, be converted into principal, and made to carry interest. And this has been often done when a considerable arrear of interest had accrued.

A day is always named for payment of the principal, and in the mean time for payment of the interest. If either the interest or the principal be not paid at the day, the mortgagee (the lender) may at any time recover it, but the mortgagor (the borrower) cannot compel the mortgagee to receive it without first giving him six calendar months' notice of his intention to pay it off. If he make a regular tender of the money on the day on which the notice expires, although the lender refuse to accept it, yet interest will no longer run: but to stop the interest, a regular tender must be made on the precise day.

In advancing money on mortgage, the estate is regularly transferred by conveyance to the lender, but is made redeemable on repayment of the money and interest. The mortgagee takes the absolute interest in the estate at law; but in equity the mortgagor is still owner of the estate to all intents and purposes. He may settle or devise the estate in the same manner as if he had not mortgaged it; and if he devise it before the mortgage, his prior disposition will, subject to the mortgage, still remain good, nor will a re-conveyance to him upon paying off the money affect the validity of the will.

In mortgages of copyholds it is not usual for the mortgagee to be admitted. The owner may devise the estate whether the mortgagee is or is not admitted. Formerly a copyholder could not devise his estate without a surrender to his will; but this is now rendered unnecessary, as I shall hereafter explain to you.

So the mortgagor may sell the estate, and pay off the mortgage out of the purchase-money; or he may sell it subject to the mortgage; but a purchaser in the latter case should either require the mortgagee's concurrence, or should be satisfied that the account stated by the mortgagor alone is correct, and should give notice to the mortgagee of the sale immediately after it is completed. A man buying an estate subject to a mortgage is without any express stipulation bound to indemnify the seller against the debt.

A mortgagor cannot after a mortgage make a lease binding on the mortgagee. The mortgagee may at any time evict a tenant holding under such a lease; but he may absolutely confirm it in regular form, or he may bind himself partially by his acts; for example, receiving the rent from the lessee, in which case the latter would be considered tenant from year to year under the mortgagee, and could not be evicted without a regular notice

to quit, but the lease would not be confirmed. The remedy of the tenant on eviction would be against the mortgagor.

It is always stipulated in mortgages, that until default shall be made in payment of the money the mortgagor shall quietly enjoy the estate. After default has been made the mortgagee may obtain possession of the estate, but although he becomes owner of the estate at law, yet he cannot without an absolute necessity make a lease of the lands which will bind the mortgagor; and as in these cases the property is considered a mere security for the debt which belongs to the personal estate, although the estate descend to the heir of the mortgagee, yet he will be a mere trustee for the executor. In order to prevent the difficulty of obtaining a conveyance from an heir-at-law, who may be an infant, or a married woman, or may be out of the kingdom, the mortgagee may expressly devise the estates vested in him by way of mortgage to trustees, with a declaration that the mortgage-money shall be considered as personal estate. If a mortgagee in possession wish the estate to vest in his devisee for his own benefit, he should expressly devise it to him for his own use, and not trust to its passing under a general devise of all his real estate; but it would still be liable to the mortgagor's right to redeem, although the money would belong to the devisee. Ample provision, however, is now made for obtaining a transfer of mortgage and trust-estates from representatives or persons incompetent to act.*

A mortgagor, even after default in payment of the money, is not liable to account to the mortgagee for the rents during the time which he has been suffered to remain in possession.

* 13 & 14 Vict., c. 60; 15 & 16 Vict., c. 55.

A mortgagor may vote at an election notwithstanding the mortgage, unless the mortgagee be in the actual possession or receipt of the rents of the estate, in which case the latter is entitled to vote;* but the mortgagor, although in possession, must be entitled to a sufficient qualification beyond the interest payable on the mortgage.

A mortgagee can take possession if he please, but he should either leave the mortgagor in possession or take possession himself; for if he give notice to the tenants not to pay their rents to the mortgagor, and do not himself receive them, and any loss is sustained in consequence of the notice, he will be liable to make it good.

A mortgagee in possession should keep regular accounts, for he is liable to account to the mortgagor for the profits which he has, or might have, received, without fraud or wilful neglect: he is answerable for wilful neglect, although not guilty of actual fraud; for instance, if the mortgagee turns out a sufficient tenant, and having notice that the estate was under-let, takes a new tenant, another substantial person offering more. But in general, if the mortgagor knows that the estate is under-let, he ought to give notice of that circumstance to the mortgagee, and to afford his advice and aid for the purpose of making the estate as productive as possible. A mortgagee in possession may, if necessary, appoint a bailiff and receiver, and charge the estate with their salaries; but if he choose to take the trouble on himself he cannot charge for it, not even formerly, if the mortgagor agreed to make him any allowance, for that would have been to give him something beyond his principal and interest; but now such an agreement would proba-

* 6 Vict., c. 18. For the property qualification of a member, see 1 & 2 Vict., c. 48.

bly be held to be binding. A mortgagee may always stipulate for a receiver on his original loan to be paid by the mortgagor.

The mortgagee cannot justify committing waste on the estate unless the security is defective, and in that case the waste must be productive of money, which must be applied in relief of the estate; nor can he enter upon any speculation at the risk of the mortgagor; therefore, if he open a mine or quarry, he must do it at his own risk, and yet the profit from it would be brought into the account against him. He need only keep the estate in necessary repair, and of course he can repay himself out of the rents; and if he increase the interest in the estate, as by renewing the lives, where the estate is held upon lives, he will be entitled to be repaid the sum advanced, with interest, which will be considered as an additional charge on the estate.

Generally speaking, a mortgagee of an advowson cannot present to it, because it would be illegal to sell the presentation. The mortgagee, therefore, as he cannot bring the presentation into the account, must present the nominee of the mortgagor. But where the mortgage is absolute, equity will not restrain the mortgagee from presenting, unless the mortgagor will pay off the mortgage-money at a short day; for it may be that the mortgagor will not redeem, and in that case the presentation belongs to the mortgagee.

It has always been laid down that neither the mortgagor nor the mortgagee can, by any adverse act, bar the right of the other. But it was decided in the great case of Lord Cholmondeley *v.* Lord Clinton, that twenty years' adverse possession, by a person claiming the equity of redemption, will bar the rightful owner. If a man with a bad title make a mortgage, and afterwards, by any

means, acquire a good title, he must confirm the mortgage. So if he obtain an increased interest in the estate, as a renewal of a lease, it will be considered as a graft upon the original stock, and be liable to the mortgage. And, by a parity of reason, if the mortgagee acquire a renewed interest in the mortgaged estate, it will, subject to the mortgage, be in trust for the mortgagor.

Now, by statute law,* if a mortgagee is allowed to remain twenty years in possession, or in receipt of the rents, without account, the mortgagor is barred of all his right in the estate, for after that period equity cannot assist him in redeeming the estate; and there is no saving for disabilities, although before the late Act equity, in analogy to the law, allowed ten years after the removal of the disability, where the mortgagor was under any disability to prosecute his claim.

But if in the mean time an acknowledgment of the title of the mortgagor, or of his right of redemption, shall have been given to the mortgagor, or some person claiming his estate, or to his agent, signed by the mortgagee or the person claiming through him, or there has been a payment of any part of the money or interest,† then the time will not run on, but still the suit must be brought within twenty years next after the last of such acknowledgments, or the last of such payments (as the case may be). There are special provisions where there are several mortgagors or mortgagees in regard to acknowledgments. The statute law has made this difference, that that which before the statute was a sufficient declaration by word of mouth, must now be in writing, and signed by the mortgagee, or the person claiming under him. The acknowledgment may be made out by

* 3 & 4 Will. IV., c. 27; 7 Will. IV., and 1 Vict., c. 28.
† 7 Will. IV., and 1 Vict., c. 28.

letters or deeds, but a mere transfer of a mortgage, subject to the equity of redemption, will not amount to an acknowledgment.

On the other hand, if the mortgagor is allowed to remain twenty years in possession without any acknowledgment or payment of any part of the principal or interest, the mortgagee will lose his security. No action or suit can be brought to recover any money secured by mortgage but within twenty years next after a present right to receive it has accrued to some person capable of giving a discharge for it, unless in the mean time some part of the money or interest has been paid, or some acknowledgment of the right to it shall be given in writing, signed by the mortgagor or his agent, to the mortgagee or his agent; the time will run from the last of the payments or acknowledgments, if more than one. And there is, it seems, the same restriction upon an action or suit to recover the land as there is upon an action or suit for the recovery of the money. Whether, therefore, you are a mortgagor or a mortgagee, you must be vigilant, or you may lose your property.

As you are tenant for life under your settlement, and happen also to have vested in you a mortgage binding the inheritance, your right to the money secured by the mortgage will not be affected by time running against you during your life, for yours is the hand both to receive and pay.

If a mortgagee will not re-convey upon payment of the principal and interest, and costs, and the right to redeem is still open, the mortgagor may by a bill in equity compel a redemption. On the other hand, if the mortgagee is desirous either to obtain back his money, or to have the estate discharged of any right of redemption, he may file a bill against the mortgagor for what is

termed a *foreclosure,* and the mortgagor will be decreed to pay the money and interest at a day named, or to stand foreclosed of all right to redeem the estate. After such a decree is perfected, if default is made in payment of the money, the mortgagee becomes absolute owner of the estate. But equity will be anxious not to hastily foreclose the mortgagor; and therefore, under proper circumstances, the time limited for payment of the money will be enlarged more than once, if there is a fair prospect of the mortgagor being able to repay the money. This is frequently a great hardship on the mortgagee, but the rule is not extended to a bill by the mortgagor for redemption; the time there will not be enlarged.

A more effectual remedy for a mortgagee is now furnished by statute.* The Court may, upon the request of the mortgagee, or of any subsequent encumbrancer, or of the mortgagor, direct a sale of the property instead of a foreclosure. But if any other party apply *except the mortgagee, his consent must be obtained,* or the party applying must deposit in Court a reasonable sum, to be fixed by the Court, for the purpose of securing the performance of such terms as the Court may impose on such party. If the mortgagee in such a suit is allowed to bid for the estate, he will not be allowed to conduct the sale.

If a man make a second mortgage without giving the second mortgagee notice of the first mortgage, or if he make a mortgage after having otherwise encumbered the estate, and do not, within six months after notice given to him by the mortgagee, pay off the encumbrances, he will, by a legislative provision, be barred of all equity of redemption, or right to redeem the estate.†

A mortgage is assignable, and the concurrence of the

* 15 & 16 Vict., c. 86. † 4 & 5 Will. III., c. 16.

mortgagor in the transfer is not actually necessary. But I advise you never to accept such a transfer without the mortgagor's concurrence, for an assignee will take subject to the real state of the account between the mortgagor and mortgagee, and therefore he should be well satisfied that the account is correct, if he dispense with the mortgagor's concurrence. The mortgagee alone cannot charge more money, he cannot increase the principal, he cannot make the interest principal. An assignee of a mortgage is entitled to the whole sum due, although he buy it at a less price. If a mortgagee *is in possession*, he should be careful to whom he assigns his mortgage without the concurrence of the mortgagor, for it has been considered that, if the assignee of the mortgage were insolvent, the original mortgagee would be answerable for the rents received, as well after as before he assigned his mortgage.

I must now draw your attention to the modern mode of introducing into mortgages a power to the mortgagee to sell, in case of default, for a certain specified time, to pay either the interest or principal secured. This is an important security to the mortgagee, as it enables him, in the event provided for, absolutely to sell the property, and to pay himself his principal, interest, and costs, without having recourse to a court of equity or a court of law to get the money repaid, or the estate itself secured to him; but as he is in the nature of a trustee of the power of sale, he cannot himself buy the estate, nor can any one for him at the sale, although by auction. This power, if the deed so provide, may be exercised by the mortgagee without the mortgagor's concurrence; and if the mortgagee act fairly, he will be the person to decide upon the time and the conditions of sale; but he should not fix upon an unlikely day to attract bidders for the former, nor intro-

duce unusual stipulations in the latter. A mortgagee who sells under the power, cannot charge more than the expenses usually allowed to a trustee, and this even where he is an auctioneer, and he or the firm to which he belongs sells the estate by auction. Before proceeding to a sale the mortgagee should carefully ascertain that the event has taken place, upon the happening of which he has a right to sell.

If *trustees* have a simple power to mortgage, they cannot give to a mortgagee a power to sell the property.

Lastly, I must inform you, that the law has lately been altered as to the right of your heir or devisee to have a mortgage on your estate paid off out of your personal estate ;* for if you do not by your will or other document signify a contrary or other intention, your heir or devisee will not be entitled to have the mortgage paid out of your personal estate, or any other real estate of yours. This, however, does not affect the mortgagee. Your heir or devisee will still be entitled to require the purchase-money to be paid out of your personal estate, for any estate which you have contracted, but not paid for at the time of your death.

* 17 & 18 Vict., c. 113, applies only to persons dying *after* 31st December 1854, and does not apply to any will or document made *before* 1st January 1855.

LETTER XV.

It now comes in order to give you a few instructions as to Leases. What I have to say on this head will lie in a narrow compass.

Leases not exceeding three years from the time of making them, whereupon the reserved rent amounts to two-thirds of the improved value, may be granted by parol, or word of mouth; but all other leases must be in writing, according to the provisions of the Statute of Frauds which I have before mentioned, and so must an *agreement* for a lease, however short the term; although here, as in the case of purchases, equity will, in some instances, for which I refer you to Letter VII., enforce even a parol agreement to grant a lease. To this, however, a party should not trust.

By a recent statute,* leases required by law to be in writing are made void at law unless made by *deed.* Therefore, as with the exception of leases not exceeding three years at a rent equal to two-thirds of the value, all leases must have been made in writing, *now they must be made by deed;* and assignments and surrenders of leases (not being of a copyhold interest) are equally required to be by deed. There are exceptions which would only puzzle you if I were to attempt to explain them. It will be sufficient for you to know that you cannot safely grant or accept a lease, or an assignment, or surrender of one, without a deed.

This alteration of the law has led to much embarrass-

* 8 & 9 Vict., c. 106.

ment. The judges felt the difficulty of holding a lease in writing, but not by deed, to be altogether void, and consequently decided that, although such a lease is void under the statute, yet it so far regulates the holding, that it creates a tenancy from year to year, and terminable by half a year's notice; and if the tenure endure for the term attempted to be created by the void lease, the tenant may be evicted at the end of the term without any notice to quit.

If an agreement, *not* by deed, for a lease for a term of years, to begin at a future day, were made, and it were to be construed to be *a lease*, it would of course be void under the statute, and the intended tenant could not force the landlord to give him possession at the time when the lease was to commence, for he would be entitled to possession only on a tenancy for the years agreed upon, and that tenancy never commenced; but it was said that the party might proceed upon the agreement to grant such a lease. This will show you the difficulty which may arise upon an informal agreement since the statute; for before the statute, if the writing, not under seal, was held to be a lease and not an agreement, still it was in favour of the intention, as collected from the instrument, and it did operate as a lease; but now in a like case, the intention, as collected, does not create the lease, but destroys the instrument.

An agreement for a lease, like an agreement for purchase, must contain the names of the parties, the consideration—viz. the rent, and also the property to be demised, and for what term. The parties must sign the agreement by themselves or their agents, in like manner as an agreement for a purchase. And the caution which I before gave you, in regard to writing letters about the sale or purchase of an estate, applies equally to leases. I

must observe, that nothing can be added to an agreement of this kind by parol or verbal evidence: you cannot, for instance, if the agreement is silent on that head, show that the tenant agreed verbally to pay the land-tax. The parties must stand or fall by the written agreement. Therefore, whatever the terms are upon which you agree, you must reduce them to writing.

If you should ever be under the necessity of entering into an agreement to grant a lease, without the assistance of your solicitor, insert an express declaration that it is meant to be an agreement, and not an actual lease. It has frequently happened, that what was intended by the parties as an agreement only, has been construed to be a lease, by which means the tenant has evaded the conditions which would have been imposed on him if a regular lease had been granted.

The law is not altered by the recent statute to which I have before referred.* What before the statute would have been a lease, although in form an agreement, will still be so construed, although, if not made by deed, the consequence may be, as I have already shown to you, that it will be void at law.

It is highly desirable that agreements for leases should contain a minute of the covenants to be entered into by the tenant. Disputes frequently arise as to the covenants to which the landlord is entitled. If you wish your tenant not to part with a lease without your consent, you should stipulate by the agreement that a proper clause for that purpose shall be contained in the lease, because you cannot insist upon such a restraint unless it is bargained for.

If you agree to grant a building-lease, the tenant must engage by the lease to insure the property, although the

* 8 & 9 Vict., c. 106.

agreement was silent on that head; but the rule is otherwise as to tenants at a full rent, or, as we term it, a rack-rent. If, therefore, you mean that a tenant at rack-rent shall insure at his own costs, you must make him agree to do so by the *contract*. If you omit this, the lease must be so framed as to exempt him from making good accidents by fire. But even in this case *you* are not bound to insure; and although the house should be burned down, yet the tenant must continue to pay the rent: so that each bears his burden; you lose your house, and the tenant loses his rent during the term. If, however, you have insured, although not bound to do so, and received the money, you cannot compel payment of the rent if you decline to lay out the money in rebuilding. It is material, however, to observe, that whatever may have been the *agreement*, unless the tenant is exempted by the *lease* from making good accidents by fire, he must, under the common covenants to repair, rebuild the house if it is burned down.

If you agree to grant a man a lease, and he afterwards says that he is merely a trustee for an insolvent who claims the lease, you are not bound to grant it.

It may be useful to state that if you grant, or even agree to grant, a lease, to hold for seven or fourteen, or any other number of years, in the alternative, the option to determine the lease at the end of the first term mentioned is in the tenant, and not in you; therefore, if this is not your intention, you should expressly provide by the agreement, or lease, that the option shall be in you as well as the tenant.

You should always, before granting a lease, consider what interest you have in the estate. If you are merely tenant for life, without a power of leasing, you must not grant a lease beyond your own life. If you have only a

power to grant a lease, which is the case with every man whose property is settled on his family, you should communicate that circumstance to your solicitor, and furnish him with a copy of the power, because a very slight deviation from it may render the lease void, by which you may not only ruin your innocent tenant, but may, by the covenant which you must enter into with him, for quiet enjoyment of the land, subject your estate to make good his loss in case he is evicted by the person entitled to the estate after your death. This has too frequently happened. A painful instance occurred in the year 1778. Sir John Astley and his wife settled her estate to certain uses, with a power of leasing to Sir John. They then, under a power in the settlement, *gave* the estate, after their deaths, to Lord Tankerville. Sir John granted a lease under his power, and died. Lord Tankerville, when he came into possession, took advantage of a defect in the lease, and turned out the tenant, who recovered his loss out of Sir John's estate, under a covenant entered into by him for quiet enjoyment; so that his property suffered severely by the act of the person to whom he had joined, with his wife, in giving the estate.

If you are restrained by your power from taking a fine on granting a lease, you must not accept any sum whatever from the tenant. But, although you are required to reserve the best rent which can be obtained, yet you are not compellable to take the highest actual offer for a lease provided you act *bonâ fide*, and reserve a proper rent, because in the choice of a tenant there are many things to be regarded besides the mere amount of the rent offered. There should, however, be some strong prudential reason to induce you to grant a lease to one at a lower rent than is offered by another.

You may exercise a power of leasing for your own benefit. For this purpose you must procure some person as your trustee, to become bound for the rent, &c. For if a proper person is legally bound to pay the rent and perform the covenants, it is unimportant to the person succeeding to the estate that the beneficial interest belongs to another. The person to whom the lease is granted should execute a deed, declaring him to be a trustee for you.

I have only one other caution to give you as to leases. Carefully avoid comprising in the same lease, at an entire rent, property, some your own, and some over which you have merely a power; such a lease would be void as to the property comprised in the power.

A court of equity will, by force of its own jurisdiction, support a *bonâ fide* lease granted under a power which is merely erroneous in form or ceremonies. And the Legislature has recently carried the right to relief much further;* for now where, in an intended exercise of a power of leasing, a lease has been, or shall be granted, which, by reason of *any* deviation from the terms of the power, shall be invalid against the remainder-man, *and the lessee has entered under it*, it is to be considered *as a contract* for a lease, with such variations as may be necessary in order to comply with the terms of the power; but the tenant cannot obtain any variation of his lease where the person in remainder is willing to confirm the lease without variation; and where any person is competent to confirm an invalid lease without variation, the lessee can be compelled to accept such confirmation. The statutes, however, greatly favour the lessee, for he can compel a new lease to be granted to him *with the neces-*

* 12 & 13 Vict., c. 26; 13 & 14 Vict., c. 17.

sary variations, whilst the landlord has no power to compel him to accept such a lease.

It is further provided that the acceptance of rent under any such invalid lease shall, as against the person accepting it, amount to a confirmation of the lease; but to bind himself he must, upon or before the acceptance of the rent, sign some receipt, memorandum, or note in writing, confirming such lease, and then the acceptance of the rent will render it complete.

It sometimes happens that, under a misapprehension, a tenant for life grants a lease by virtue of a power before he is properly in possession as tenant for life, and the statute renders such a lease valid if the person granting it shall continue to be entitled to the estate after the time when he might have granted such a lease.

LETTER XVI.

WHERE powers beneficial to all persons who could claim under a settlement were not contained in the deed or will strictly settling the estate, Parliament was in the habit, but with great caution, of supplying the omission; but now, to save the expense and delay of resorting to the Legislature, provisions have been made* which ought to be known by every owner of a settled estate in the kingdom. The provisions apply to Ireland as well as to England. You must be content with an outline of them. The Court of Chancery is empowered from time to time to authorise leases of the whole or any part of any settled estates, or of any rights over or affecting them for any purpose whatsoever, whether involving waste or not, upon the conditions imposed by the Act—viz.,

Every lease is to take effect in possession or within 1 year, and for terms not exceeding

21 years for an agricultural or occupation lease.

40 years for water, water-mills, way-leaves, &c., or other easements.

99 years for a building-lease, or, in this instance, if authorised by custom, for a longer term.

The best rent, without a fine, is to be reserved half-yearly, or oftener, with special provisions as to minerals and the interests therein of remainder-men.

The lease is not to authorise the felling of trees except where necessary for the buildings or works authorised by the lease.

* 19 & 20 Vict., c. 120.

The lease is to be by deed, and the lessee is to execute a counterpart; and there is to be a condition for re-entry if the rent is 28 days in arrear, and such other covenants as the Court shall direct.

The Court may authorise preliminary contracts, and the terms may be varied in the leases.

The lessees may surrender the leases, and new leases may be granted of the property surrendered.

The Court is to direct who are to be the lessors.

The Act then provides by whom application may be made to the Court, and with whose consent, with other important provisions; but most of these provisions apply equally to sales under the Act, to which I propose to call your attention in my next Letter, and I do not therefore add them here. I will affix an asterisk to such of them as refer to leases, and thus put you in possession whilst I avoid a repetition of them.*

The Act, then, provides that every person in possession of any settled estate for his life, or years determinable with his life, or for any greater interest in his own right or in right of his wife (unless there is an express declaration to the contrary in the settlement), and also any person entitled in possession to any *unsettled* estate as tenant by the curtesy, or in dower, or in right of a wife seised in fee, *without any application to the Court of Chancery* [pray observe this] may lease the estate (except the principal mansion and the demesnes and lands usually occupied with it) for 21 years; but this power only extends to settlements made after the 1st of November 1856.

The lease under this last power must be made to take effect in possession and by deed, and at rack-rent without

* P. 115.

a fine, which rent will go with the estate. The lease must not be made dispunishable of waste, and must contain a covenant to pay the rent, and such other usual and proper covenants as the lessor shall think fit, and a right of re-entry on non-payment for 28 days of the rent, and on non-observance of any of the covenants in the lease. A counterpart of the lease is to be executed by the lessee, but the execution of the lease by the lessor is made evidence that a counterpart of it has been duly executed by the lessee.

There are two important powers in the statute—one relates exclusively to leases, the other is general—which may properly find their place in this Letter.

I. The Court is authorised, where it shall be deemed expedient, to vest any general powers of leasing any settled estates either in the existing trustees of the settlement or in any other persons, and may impose any conditions as to consents or otherwise on the exercise of such powers, and may also authorise the insertion of provisions for the appointment of new trustees for the purpose of exercising such powers of leasing.

II. The Court, with a due regard to the interests of all parties, may direct that any part of any settled estate be laid out for streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or water-courses, either to be dedicated to the public or not, and the Court may direct the parts so laid out to remain vested in the trustees, or to be vested in any other trustees, and with provisions for the appointment of new trustees, as shall be deemed advisable.

I may now mention to you that rents received upon a lease by a tenant in fee, or for life, or granted under a

power, and all other rents becoming due at fixed periods under any instrument, are, upon the death of any person interested in such rents, or on the determination by any other means of his interest, made apportionable in favour of such person or his personal representatives, unless it shall be expressly stipulated that no apportionment shall take place.*

I shall conclude this Letter by informing you that there is an Act of Parliament† which, if you express your lease to be made in pursuance of it, enables you to adopt a few words to which an extended meaning is given by the Act: the object was to facilitate the granting of leases by shortening of them, but like its twin brother, an Act for Shortening Conveyances,‡ it has not, I believe, been resorted to in practice.

* 4 & 5 Will. IV., c. 22. † 8 & 9 Vict., c. 124.
‡ 8 & 9 Vict., c. 119.

LETTER XVII.

THE subject for the present Letter is the Settlement of your Estates.

I may premise that the Statute of Frauds, to which I have so often referred you, requires agreements made upon consideration of marriage to be in writing, and signed by the party to be charged therewith, or his agent. A letter, however, is considered a sufficient agreement, if it contain the terms, and amount to an offer. In one case a man wrote a letter, signifying his assent to the marriage of his daughter, and that he would give her £1500; and afterwards, by another letter, upon a further treaty concerning the marriage, he receded from the proposals of his letter. And at some time afterward he declared that he would agree to what was propounded in his first letter. It was held that this letter was a sufficient promise in writing; and that the last declaration had set up again the terms in the first letter. Reliance, however, should never be placed on a mere letter.

Equity will, in some cases, relieve a party on the ground of fraud, although there is not a valid agreement. A man of the name of Halfpenny, upon a treaty for the marriage of his daughter, signed a writing, comprising the terms of the agreement; and afterwards designing to elude the force of it, and get loose from his agreement, ordered his daughter to put on a good humour, and get the intended husband to deliver up the writing, and then to marry him, which she accordingly

did; and Halfpenny stood at the corner of a street to see them go by to be married, and afterward refused to perform the agreement. He was, however, compelled by equity to do so; although while the case was before the Court he walked backwards and forwards, calling out to the judge *to remember the statute,* which he humorously said, *I do, I do;* and he held the case to be out of the statute on the ground of fraud.

In settling an encumbered estate you should always make some provision for payment of the encumbrances, otherwise the encumbrancer might, as sometimes has happened, enter, and receive all the profits, to the exclusion of your wife and children. Where a considerable jointure is provided for a wife, and large portions for younger children of the marriage, it is desirable to appropriate a part of the estate for each, and not to charge the whole estate with both. If you make a settlement on a son's marriage in your lifetime, you should make some provision for the event of his dying before you, leaving children. A fund ought to be provided for their maintenance in that event.

The common settlement on a marriage, of the intended husband's real estate, is to the husband for life, then to secure the wife's jointure and the younger children's portions, and subject thereto, to the first and other sons successively in tail; and then to the daughters, as tenants in common in tail, with cross-remainders in tail, and ultimately to the husband in fee. The operation of such a settlement is to give the estate after the husband's death, subject to the jointure and younger children's portions, to the eldest son, and after him to his issue *ad infinitum;* and if they fail, to the other sons and their issue, successively in like manner. If they all fail, then the daughters take equally, and the

share of each daughter goes to her issue in like manner; but if there is a failure of issue of any daughter, her share goes over to the other daughters and their issue. If all the children die without issue, the estate reverts to the husband, and he may dispose of it by deed or will, subject to the interests of his widow and children. The estates which children thus take are termed estates-tail, the nature of which I have explained to you in Letter X.

When the eldest son attains twenty-one, he and his father together can unfetter the estate, and re-settle it as they please, subject only to the jointure and portions. And after the father's death the son may do it by himself; nor can the father defeat his power of alienation. Where a son attains twenty-one in his father's lifetime, the father frequently grants his son a provision during their joint lives, in consideration of which the son joins with his father in re-settling the estate, in such a manner that, if he dies without issue, the estate may go over to the younger branches of the family. Sometimes, instead of a rent-charge, the estate itself is given to the wife for life, after her husband's death; in which case the son cannot, after his father's death, and during her lifetime, unfetter the estate without her concurrence. Where a settlement is made on the eldest son's attaining twenty-one, and a provision is made for him during the joint lives of him and his father, it is not unusual to increase the mother's jointure, and to add to the younger children's portions, besides confining the son to a tenancy for life, and giving the estate over to the younger branches, if his issue, for whom, of course, provision is first made, should fail. In such a case, if the eldest son should die in his father's lifetime, leaving issue, provision should be made for them during the lifetime of their grandfather. It has unfortunately happened

that in some cases of this nature, the son, generally after he has wasted the provision made for him, has filed a bill against his father to set aside the re-settlement, on the ground of parental influence, and the want of a sufficient consideration or price given by the father for the interests which the son transferred from himself by the re-settlement. It is rarely that the attempt has succeeded, although if the case were made out, the Court would set aside the re-settlement. But the inclination of the Court is to support such a transaction where there has been fair dealing with the son, and it will not weigh in very nice scales the consideration on the one side or the other. There must, however, have been no advantage taken of the son's youth and inexperience, or of his necessities.

The desire of continuing an estate in the male branch frequently induces the parent to give the estate, in the first instance, to the issue male of his sons, with remainder to his daughters, not altogether, but successively, and to their issue male only ; and in that case no provision is made for the female issue of his sons and daughters, unless there is a failure of issue male. This mode of settlement a lawyer would shortly describe thus : to the first and other sons successively in tail male ; remainder to the first and other daughters successively in tail male ; remainder to the first and other sons successively in tail general ; remainder to the first and other daughters successively in tail general. The mischief of this plan is, that the estate may go backwards and forwards from one branch of the family to the other. Thus if you have an only son, and he dies and leaves a daughter, but no son, the estate will go over to your eldest daughter ; but if she dies and leaves no son, although she leaves daughters, the estate will belong to the daughter of the eldest son.

It is very usual to give the estate merely to the issue male of the marriage, and then to direct it to revert to the parent, subject to the widow's jointure and the daughters' portions; but where this plan is adopted, additional portions are mostly provided for the daughters in case there is a failure of issue male. On the other hand, an estate is sometimes given amongst all the children, as well sons as daughters, and their issue equally; in which case of course no money is directed to be raised for the portions of younger children.

In making a marriage settlement a man should always look to a future marriage. His wife may die young, leaving an infant family, and he may have no power to jointure any other wife, or to provide portions for the children of any other marriage. The same observations apply to a woman who is about to settle property on her marriage. I remember an instance where a young lady with a competent fortune married a man without any, and her fortune was settled on the husband for life, then to her life, and afterwards to the children, and if none, to him. He died very shortly after the marriage, and there was no child, and the reversion passed by his will: in the result, she was left a young widow, with a life-interest only in her own fortune.

Sometimes a separate provision is made for a wife during her husband's lifetime. This is called pin-money. It is always the first charge on the estate, so that the husband takes subject to it. If, however, a wife permit her husband to receive her pin-money, or, what is the same thing, do not claim it, and he maintains her, she cannot after his death compel payment of more than one year's arrears out of his estate.

In an important case in the House of Lords, it was asked with reference to the wife of a noble duke, with a

large amount of pin-money—Shall it be said that this lady may dress herself like a peasant's wife, may lay out £10 by the year upon her own personal expenses, may give no money, either in charity to the poor, or in largesse to her servants, her attendants, or her maidens —that she may in every respect spare every expense upon her person, and hoard her pin-money, and that she has a right to do so in neglect of the rank, and in spite of the authority of her husband?* And an opinion was expressed that pin-money is a fund which she may be made to spend during the coverture, by the intercession and advice, and at the instance of her husband; and an opinion was even expressed that he might hold back her pin-money, if she did not attire herself in a becoming way. But notwithstanding this high authority, I must warn you that the wife's liability thus to expend her pin-money is one which the civilians call a duty of imperfect obligation. She cannot be made to spend it in dress, ornaments, gifts, or charity; nor can her husband withhold payment of the pin-money, though she be a miser and a slattern. Such a power in the husband would destroy the very object of the provision—that he should not examine into her disposition of her pin-money, whether for articles of dress, ornaments of her person, pocket-money, card-money, charities, or any other objects. But her right to demand from her husband what her pin-money ought to supply her with is a very different question.

It is usual to reserve such powers in a settlement as will conduce to the benefit of the parties, or the estate. Thus powers are almost always given to grant building-leases and leases at rack or full rents, and even to sell

* These circumstances had not occurred; but the questions were asked with reference to the right to the arrears of the pin-money after the duchess's death.

the estates and buy others, or to exchange them for others. Where an undivided part of an estate is settled, a power should be given to the trustees to join in a partition of the entirety, and take back a divided part of the estate.

If a man were now to object to the introduction of powers to lease or to sell in his settlement, he must go further, and declare that the powers given by the Act, to which I referred you in my last letter, shall not be exercised over the estate. In that letter I stated to you the powers of leasing conferred by that statute, and I have now to inform you of the other important powers in that Act of Parliament,* and I shall, as I promised I would, mark those provisions with an asterisk which apply to leases as well as to sales.†

The Court of Chancery in England, and that in Ireland, with a due regard for the interests of all parties entitled under the settlement, may, from time to time, authorise a sale of the whole or any parts of any settled estates, or of any timber (not being ornamental) on any settled estates: the sale to be conducted as in the case of sales under a decree.

Upon a *sale* for building purposes, the whole or part of the consideration may be a *rent* issuing out of the land, if the Court shall think fit.

Upon sales of land—earth, coal, stone, or mineral may be excepted, and any rights or privileges may be reserved, and the Court may require the purchaser to enter into any covenant, or submit to any restrictions, which it may deem advisable. And the Court is, in every case of a sale, or of such a dedication of land as I have mentioned to you in my last letter, to direct who is to convey.

* The application for the exercise of the powers may be made by any person in possession for a term of years,

* 19 & 20 Vict., c. 120. † P. 106.

determinable on his death, or for an estate for life or any greater estate.

But every application must be made with the consent of the following parties—viz. where there is a tenant in tail, under the settlement, of full age, then such tenant in tail, or the first of them, if more than one; and all persons in existence having any beneficial estate or interest under the settlement *prior* to such estate-tail, and all trustees having any estate or interest on behalf of any unborn child *prior* to such estate-tail.

Provided that *unless there shall be a person entitled to an estate of inheritance, whose consent shall have been refused or cannot be obtained*, the Court may give effect to any application, so as not to affect the rights of any person whose consent has been refused or cannot be obtained, or whose rights ought in the opinion of the Court to be excepted.

* A person is to be deemed entitled to the possession or to the receipt of the rents, although his estate may be charged or encumbered either *by himself* or by the settlor, or otherwise howsoever *to any extent;* but the estates or interests of the parties entitled to any such charge or encumbrance, are not to be affected by the acts of the person entitled to the possession or to the receipt of the rents, unless they concur therein.

I never could understand how this clause would work. If the tenant for life has encumbered his life estate, the encumbrances cannot be paid off out of the purchase-money, for that is to be reinvested, and therefore the purchaser would have to pay the entire purchase-money for the estate in fee, and yet would be liable to the encumbrances of the tenant for life, if the encumbrancers did not concur in the sale.

* There is a useful provision, that the Court shall direct

notice of any exercise of the powers conferred on it to be placed on the settlement, or any copies of it, or otherwise recorded, as it may think proper, where it shall appear to be practicable and expedient for preventing fraud or mistake.

* There are proper provisions for securing the purchase-monies, and also the portion to be set aside under leases of minerals. The application of the money is directed to be in the redemption of land-tax, or the payment off of encumbrances, or in the purchase of other estates to be settled to the same uses, or in the payment to any person becoming absolutely entitled. The money in the mean time to be invested, and the interest paid to the person who would be entitled to the rents of any land purchased.

* Liberty is given to the Court to exercise any of the powers repeatedly. But no powers shall be exercised if an express declaration or manifest intention that they shall not be exercised is contained in or may be reasonably inferred from the settlement, *or from extrinsic circumstances or evidence.* Provided that the circumstance of the settlement, containing powers to effect similar purposes, shall not preclude the Court from exercising any of the powers conferred by the Act, *if it shall think that the powers in the settlement ought to be extended.* This I thought was going too far.

* But the Court is not empowered to authorise any lease, sale, or other act beyond the extent to which, in the opinion of the Court, the same *might have been* authorised by the settlement by the settlor.

* This portion of the Act winds up with this important declaration—that no lease, sale, or other act completed under its authority, and purporting to be in pursuance of it, shall be invalidated on the ground that the Court was not empowered to authorise the same, except

that no lease, sale, or other act is to have any effect against any person whose consent to the application ought to have been and was not obtained.

* The Court has power to order the costs to be a charge on the estates, or to be raised by sale or mortgage of them, or out of the rents.

* The powers given by the Act, and applications to the Court and consents, may be exercised by guardians for infants, by committees for lunatics, and by assignees of bankrupts or insolvents; but the special direction of the Court is required in the cases of infants, or lunatics tenants in tail.

* The usual provision is made for the separate examination of a married woman applying or consenting; but although she is restrained from anticipation by the settlement, yet the Court may exercise any of its powers, and it is unimportant that she is an infant.

There is a proviso, that estates rendered inalienable by Act of Parliament, or where the reversion is in the Crown, shall not be sold or leased beyond twenty-one years. And there is a saving of the rights of lords of manors.

I have only to add, that no one is compellable to make or consent to any application to the Court, or to exercise any powers, whether to lease or to sell.

A desire has often been shown, not merely to improve the law of real property, but unnecessarily to alter it, and to admit only simple settlements after the fashion of the Code Napoleon. But the present plan of a strict settlement in this country is free from all objection. It does not place land *extra commercium*, but within reasonable limits enables the owner to transmit it to all his posterity; and from its very nature leads to successive settlements, which alone have kept many estates

in the same families. Our law allows no dispositions which tend to a perpetuity, nor can we attach any condition to our gifts which are against public policy; for example, you could not limit an estate to one in fee upon condition to be void if he cultivated his arable land, and there are other instances which were brought forward in the great Bridgewater case in the House of Lords. We have substituted for fines and recoveries another simple but deliberate form; have protected contingent remainders without the elaborate machinery formerly resorted to; and have at once enlarged the testamentary power, and altered the law of revocation by subsequent disposition. These improvements, and the disposition to curb the rising desire to evade the wholesome rule of law as to perpetuities, have struck at the root of the leading evils in the law of property. The common law was evaded, because mankind, in spite of legal restrictions, will settle their property on their posterity and relations in succession. The rule as now established is open to no inconvenience. If we look at the frame of a common marriage-settlement, we shall find it strictly provide for all the issue of the marriage, and yet not suspend, beyond a reasonable period, the power of alienation. The estate, as I have before stated, is limited to the husband for life; then the wife, if she survive him, is to have a rent-charge for life; and subject to that, the estate is to go (1.) to the first and other sons successively in tail male; remainder (2.) to the first and other sons successively in tail general; remainder (3.) to the first and other daughters in tail general, or, if you will, to all the daughters as tenants in common in tail general, with cross-remainders in tail general, with remainder to the settlor in fee, and portions are provided for the younger children. Now

under such a settlement the father enjoys the whole estate for his life without control ; upon his death the sons, and their issue male after them, take in succession, and then the issue female of the sons are let into the enjoyment ; and if they fail, the daughters and their issue take ; and this course of devolution, if not interrupted, will take place until all the issue is exhausted. But when a man attains twenty-one, although his father is living, he may alone acquire the disposition of the estate during the continuance of any issue which he may have, although it rarely happens that this power is exercised, unless where a son is not upon good terms with his father, and desires to render his estate available as far as he can as a security for debts in his father's lifetime ; and in such cases, after his father's death he may acquire the whole dominion over the estate ; but fortunately for families, the interest which he can in his father's lifetime acquire without his consent, in the property, is not such as money-lenders will advance money upon, for if he should die in his father's lifetime without issue, all his interest in the estate would cease. With his father's concurrence the son may bar all the remainders over, and acquire the fee subject to the father's life estate. If a son marry in his father's lifetime with his approbation, the power to bar the remainders is constantly exercised, and a new settlement is made. Where there are younger children of the first marriage, the father is always anxious to have the estate re-settled on them and their issue, in case of failure of issue of the first son. This he cannot accomplish without the concurrence of the son ; and as the son upon his establishment in life, in his father's lifetime, requires an immediate provision, the father generally, as I have already observed, secures to him a provision during their joint lives as a considera-

tion for the re-settlement of the estate in remainder upon the younger sons. Thus are estates quickly re-settled, and the State does not, that I am aware of, suffer any inconvenience from such repeated settlements. No man in this country can justly complain that there is not sufficient land in the market on sale. If the estate is not re-settled in the father's lifetime, the son can, after the father's death, acquire the absolute ownership in the property, and dispose of it as he pleases; and so, if the estate is left in a course of descent, may every successive remainder-man. But although upon a settlement a father may be willing to abridge his estate in favour of his issue, and confine himself to a life interest, yet he is always anxious to retain every power of disposition over the property which is compatible with the interest of his children. The extent of the father's powers must in each case depend upon the agreement and wishes of the parties; but in a common settlement of an estate of any magnitude there are inserted powers to the father, with proper checks, to lease the estate according to the nature of it; to sell it, and buy another estate with the money, to be re-settled; to exchange it for another eligible to be brought into settlement; and if an undivided share is settled, to make partition with the owners of the other shares: thus, on the one hand the estate is secured to the children of the marriage to the latest generation, without preventing their power of aliening; and on the other, the father, although necessarily confined to a tenancy for life, is invested with such ample powers over the estate, that for all purposes of reasonable enjoyment he would be ignorant, were he not otherwise aware of the fact, that his rights of ownership are curtailed: he is enabled to make every disposition of the estate which tends to meliorate it: he has every capacity of an owner

in fee to benefit the estate and himself, as the temporary owner of it, in common with the remainder-men, but none to injure it. The natural dependence of the son's estate on the father's, counteracted in a sufficient degree by the inability of the father to make any re-settlement without his son's consent, is also an important result of such a settlement. It would not be endured that a son should be allowed, living his father, to dispose of the family estate without his father's consent, although limited to him, subject to his father's life-interest. The present system leaves the son the full property during his father's lifetime, for the purposes of transmission by descent, and assures to him, as far as is practicable, the enjoyment of the estate when in the regular course it devolves upon him in possession. It restrains his wanton alienation of it from the family before he knows its value ; but as he can, with his father's concurrence, acquire the fee and make a new settlement, few, indeed, are the instances in which the mutual interests of the father and son do not lead to an equitable adjustment of their rights, when the proper time for a new disposition arrives.

It is objected that these purposes are effected by a complicated and an expensive machinery ; but whoever complained of the complex movements in a well-finished watch ? We admire the connection of its parts depending on each other, and all necessary to form the combination which produces the desired results. Why then should we complain of a well-digested settlement ? Its length is occasioned by the multiplicity of its provisions, most of which will, and every one may, be brought into action : the absence of a single one may tend to great expense and inconvenience. Settlements, as they are now framed, are the result of the improvements of centuries ; they meet the wishes and wants of mankind,

and are open to no sensible inconvenience; and yet we are required at once to discard them for ever. The attempt to shorten conveyances by legislative enactments has been proved to be hopeless; it must be left to the good sense and honour of the conveyancers; for if you were to render it unlawful to adopt any other than a prescribed form of grant, yet a long deed might always be made by unnecessary recitals of the previous title.

There were forms necessary for unfettering a freehold estate which have been abolished; but upon a close inspection we shall find how great a debt we owe to our ancestors at the bar, and on the bench, for the very forms of which we complained; they were all invented to obviate the injustice of prior statutes and laws, and have led to the system under which we have flourished. They are now no longer necessary. The benefits have been retained without the ceremony, which had become useless and expensive: we are more enlightened, and feared not to do that directly, which our ancestors could only accomplish indirectly; and therefore we were all agreed that the substance should be retained, and that we should arrive at it by a cheap and direct road instead of an expensive and crooked way. Let us never confound substances with forms; and because we do not approve of the trappings, sacrifice the noble animal whom they encumber, but do not adorn.

In executing the powers vested in you by your settlement you must always be guided by good faith: if under a power to lease at rack or full rent, without taking a fine or premium, you accept a bonus, you commit a fraud on the power, and your lease will accord-

ingly be void; if you exercise a power to jointure your wife with a stipulation that she shall join with you in securing your debts on her jointure, the appointment will be void. Nor must you abuse your authority. If you have a power to sell settled estates, and to lay out the money in the purchase of other estates, although there is a direction in the settlement that until a purchase is found the money shall be laid out in the funds, yet the intent of the power is, that one estate shall be sold only for the purpose of laying out the money in the purchase of another. Therefore you cannot sell the estate in order to keep the purchase-money out at interest, for that would increase your income at the expense of the capital. It would, it is true, give you a larger per-centage; but the same money probably would not at a distance of time purchase an estate of the same value as that which you sold.

In some instances equity will restrain rights given by a settlement with which you may conceive they ought not to interfere. Under your marriage settlement you are tenant for life, *without impeachment of waste*, or, in other words, you are not punishable for committing waste, and consequently you may legally cut down as much timber on the estate as you please. But still *equity* will not suffer you to cut down any trees which are an ornament, or afford shelter to the mansion-house, or to any of the buildings on the estate, or which grow for ornament in any of the vistas, avenues, walks, pleasure-grounds, or plantations on the estate. Nor can you justify the act, by having yourself planted even millions of trees on the estate subsequently to the settlement; therefore, if a man making a settlement really mean to reserve power to cut whatever timber he please, whether it afford ornament, or shelter, or not, the intention

should be expressly declared in the settlement. The power which the courts of equity have assumed to restrain the exercise of the right which the words "without impeachment of waste" confer at law, is a power which one cannot but lament they should possess. The Court can, in general, only judge of the ornament or shelter afforded by the trees from the affidavits in the cause. Men are but too ready to support the cause of their principal, without always considering sufficiently the justice of it. Affidavits flatly contradicting each other are in these cases almost invariably made by the agents of the different parties. This facility of restraining a tenant for life from exercising his *legal* right foments and irritates domestic strife, makes the son the shameless antagonist of his parent in an open court of justice, and fixes into eternal enmity that disagreement which conciliation might happily have effaced. If such a proceeding wound the peace of a parent in the evening of his days, how severe a punishment does the child inflict on himself! To save a few perishable trees, he preserves, while they last, a monument of his want of filial duty; he keeps a signal to remind his own children of the duty which they owe to him.

Equity will also restrain a tenant for life, although *without impeachment of waste,* from defacing or pulling down the mansion-house. This was done in the year 1716, in Lord Bernard's case. He had almost totally defaced the mansion-house, by pulling down great part of it, and was going on entirely to ruin it, whereupon the Court not only enjoined him not to proceed farther, but compelled him to rebuild, and put it in the same plight and condition it was at the time of his entry thereon.

Where money to any considerable amount is settled, a

power should be reserved of laying it out in land to be re-sold when convenient, and in the mean time to be treated as money.

In money settlements, generally, and sometimes even in settlements of real estate, a power is reserved to the parent to appoint the property to all or such of the children as he shall think fit. If the power is only to appoint the proportions amongst the children, he cannot exclude any; every one must have a share; but he may now give to any a share merely nominal.

* The Act which made what were termed illusory appointments, that is, appointments of nominal sums, good in equity, as they always were at law, proceeded upon this principle, that as the power required every one to have a share, the donee of the power could not properly exclude any, although he might give what he pleased—1s., for example, to one or more. Of course, where the power is to appoint to any exclusively, he may give all to one; as in substance he may under the former power. But still in this, as in all other cases, the power must not be abused. An appointment cannot be made to a child under any stipulation for the parent's benefit; for example, that he shall join in a sale of the estate, although the child may, after the appointment, if he think fit, join with his father in selling the estate, and the transaction cannot be impeached if the money is fairly paid to the father and son. So if you have a power to appoint any sum to any of your children, at what age you please, you cannot appoint it to a sickly child under age, in order that upon his death you may get it as his administrator.

Almost any instrument, however informal, upon which the intention clearly appears, will be deemed in equity a good execution of a power of jointuring, or of appointing

* 1 Will. IV., c. 46.

property to your children ; but such difficulties arise in these cases that I cannot too much impress upon you the necessity of never doing any act in relation to estates over which you have only a power, without first applying to your solicitor.

Where a power is given to appoint a fund amongst children, and the property is given to them in default of appointment, it is mostly declared that no child shall take a share of any part unappointed, without bringing his appointed share into hotchpot—which word hotchpot, our famous judge Littleton, with great gravity, tells us is, in English, a pudding. The object of this provision is to compel a child, to whom part is appointed, to bring his appointed share into the general fund, *if he is desirous to take a share of the part unappointed.* Thus, suppose there be two children, and the fund to be £200, if you give £20 to one, he must give up that, in order to obtain an equal share of the £200 with the other child. This you should always keep in view, and more particularly where there is not such a clause in the settlement ; for in that case a child would not only take the part actually appointed to him, but would be entitled equally with the other children to the residue, although this can seldom be the intention of the party executing the power.

If you should ever covenant to purchase and settle estates, you will, if you are wise, perform the covenant in your lifetime. However, if you do purchase estates, which are proper to go in performance of your agreement, they must go accordingly, although you have permitted them to descend to your heir: consequently he will not be entitled to retain them for his own benefit.

It is not unusual for a parent, upon a daughter's mar-

riage, to agree to leave her at his death a fortune equal to his other children. Such an agreement does not confine or restrict the father's power; he may alter the nature of his property from personal to real, or he may give scope to projects, or indulge in a free and unlimited expense—but he will not be allowed to entertain mere partial inclinations and dispositions towards one child at the expense of another. If his partiality do rise so high, and he will make a difference, he must do it directly, absolutely, and by a gift surrendering all his own right and interest; he must give out and out; he must not exercise his power by an act which is to take effect, not against his own interest, but only at a time when his own interest will cease. He cannot, for instance, give property in his lifetime to one child, reserving the interest to himself, for such a gift is, in fact, testamentary, and in fraud of his agreement.

If after you have disposed of an estate by will you make a settlement of it, under which the estate is still vested in you, subject to the interest given to others, generally speaking, it will not now be necessary to re-execute your will. Partial interests may be created, so as not to affect the operation of a prior will as to the interest left in the settlor, if there are proper general words in the will to pass it; but you should inquire whether the conveyance renders a re-publication of your will necessary, or, perhaps, it would be better to re-publish your will without inquiry. The operation of your will in such a case will be explained to you in Letter XIX.

I have still to draw your attention to a recent Act of Parliament, of great importance, which would have led to much mischief if the Court had not properly come to the determination that it had power to consider the propriety of the marriage.

This Act* makes it lawful for every infant, upon or in contemplation of marriage, with the sanction of the Court of Chancery, in a summary way, to make a binding settlement or contract for one of all, or any part of his real and personal estate, or of property over which he has any power of appointment. But this is not to extend to powers, of which it is declared (by the instrument creating them), that they shall not be exercised by an infant. The Act gives the same power to a female infant, but the male must not be under the age of twenty years, or the female under the age of seventeen years. The policy of the Act in giving this power to a young man between twenty and twenty-one may be doubted.

But if any appointment under a power, or any disentailing assurance, as it is termed—that is, the mode appointed by law to enable a tenant in tail to dispose of the fee which I have explained to you in Letter X.—shall have been executed by any infant tenant in tail under the Act, and such infant shall afterwards die under age, such appointment, or disentailing assurance, will become absolutely void. This was quite right.

I must conclude by reminding you of the Succession Duty Act,† which has deprived property of half its charms: it is as if a blight had fallen on the fair fields of England. Every man had the right to keep his parchments—his sheepskins—in his own box, in his own house: no one had a right to pry into the contents of his settlements. Now every man's settlement must be open to the tax office and to the Government of the day, ever on the watch for a new succession, in order to levy a new duty. If, for example, a stipend is provided for an old

* 18 & 19 Vict., c. 43. † 16 & 17 Vict., c. 51.

servant who dies, as even annuitants some time must, that creates a succession, and the person entitled to the property has to pay duty for his new enjoyment. You cannot, when liable to duty, cut trees on your estate beyond the value of £10 a-year, without giving notice to the tax officer, and paying duty. Mr Pitt, in the plenitude of his power, was foiled in his attempt to introduce a much milder impost on successions than is fixed upon them by the law to which I have referred you. The net is large and widespread, and the tax, from its nature, is the most vexatious burden ever laid upon property in England.

I have no more information to give you as to settlements, and therefore adieu !

LETTER XVIII.

I NOW write to you upon one of the most important subjects on which I have promised you any information. It has been in some measure anticipated in Letter III.

Before making your will, there are many questions which you should ask yourself.—Is it probable that I shall be much in debt at my decease? Are there charges on my estate which must be provided for on my death? What is the nature of my property? Is any part of it already settled, or agreed to be settled, on my family? Have I charged portions on any part of it for my children? What advancements have I already made for them? Is my wife dowable of any part of it? Am I only tenant in tail of any part of my estate? in which case it would be necessary to bar the entail to give effect to your will, even if the property be leasehold, in which you cannot, properly speaking, be tenant in tail, but only a tenant in the nature of a tenant in tail. I have explained the nature of an estate tail in my Tenth Letter. These are questions which you should resolve before you give instructions for your will. If any part of your family estate is leasehold, you should direct it to go along with the estate with which it is held. This lawyers can easily effect to the utmost limits which the law allows. They can, in like manner, direct pictures, sculpture, and other personal effects, to go as heir-looms. If your children are entitled to portions, you should declare whether you intend what you give them by your will to be in addition to their portions, or in satisfaction of

them. I have already advised you, if you make any provision for your wife, to state whether you mean it to be in lieu of dower.

If you have given your children legacies by your will, and afterwards advance portions with them on their marriage, you should declare by a codicil whether they are still to be entitled to the legacies.

If you have advanced them in your lifetime, and then make any provision for them by your will, you should declare whether you mean it to be in addition to the advances. So if you have given a legacy by your will, and you afterwards give another to the same person by a codicil, you should declare whether or not you mean him to have both.

In giving instructions, where you wish your estate to remain in your family, state to your solicitor, whether you mean your sons' daughters to be preferred to your own or not, and whether your sons' daughters are to be preferred to your daughters' sons, and so on; and also state what powers you wish them to have—as to lease, jointure, grant portions for younger children, sell and exchange; and if you do not intend them to exercise the powers given to tenants for life generally by the Legislature (which I have referred to in Letters XVI. and XVII.), state so distinctly.

Never in your will say generally that your debts shall be paid, but declare out of what fund they are to be paid; nor leave it in doubt, if it should become necessary to sell your property to pay them, by whom the sale is to be made. The Legislature has saved you from the danger of "sinning in your grave,"* by not providing for the payment of your debts; for now all your property, both freehold and copyhold, which you shall

* 3 & 4 Will. and Mary, c. 14; 1 Will. IV., c. 47; 3 & 4 Will. IV., c. 104.

not by your will charge with or devise subject to your debts, and of course all your personal estate, will be liable at your death to all your debts—by simple contract as well as by specialty.

I am somewhat unwilling to give you any instructions for making your will, without the assistance of your professional adviser; and I would particularly warn you against the use of printed forms, which have misled many men. They are as dangerous as the country schoolmaster or the vestry clerk. It is quite shocking to reflect upon the litigation which has been occasioned by men making their own wills, or employing incompetent persons to do so. To save a few guineas in their lifetime, men leave behind them a will which it may cost hundreds of pounds to have expounded by the Courts before the various claimants will desist from litigation. Looking at this as a simple money transaction, lawyers might well be in despair if every man's will were prepared by a competent person. To put off making your will, until the hand of death is upon you, evinces either cowardice, or a shameful neglect of your temporal concerns. Lest, however, such a moment should arrive, I must arm you in some measure against it.

If you wish to tie up your property in your family you really must not make your own will. It were better to die without a will, than to make one which will only waste your estate in litigation to discover its meaning. The words "children," "issue," "heirs of the body," or "heirs," sometimes operate to give the parent the entire disposition of the estate, although the testator did not mean any such thing. They are seldom used by a man who makes his own will without leading to a lawsuit. And now an operation has been given to like words by the new statute, which I could not explain to you with-

out you possessed more knowledge of law than I give you credit for.* It were useless for me to attempt to show you how to make a strict settlement of your property, and therefore I will not try. I could, without difficulty, run over the names of many judges and lawyers of note, whose wills made by themselves have been set aside, or construed so as to defeat every intention which they ever had. It is not even a profound knowledge of law which will capacitate a man to make his own will, unless he has been in the habit of making the wills of others. Besides, notwithstanding that fees are purely honorary, yet it is almost proverbial that a lawyer never does anything well for which he is not fee'd. Lord Mansfield told a story of himself, that feeling this influence, he once, when about to attend to some professional business of his own, took several guineas out of his purse, and put them into his waistcoat pocket, as a fee for his labour.

Always avoid, and particularly when you make your own will, conditional gifts and devises over in particular events. It is the folly of most testators to contemplate a great many events for which they too often inadequately provide. You give me a horse, "and if I die," you give it to my son. Here a question at once arises, when the death is to happen—Generally? In your lifetime, or in my son's? Pray avoid this; and if you must give a thing over, after you have given the entire interest to one, state precisely in what event, and if depending upon the death of the first legatee, whether you mean a death in your lifetime, or in the lifetime of the legatee over: And I must tell you, that where you have given the absolute interest, you ought not to make any gift over which will not take effect in a life, or lives, who shall be

* 1 Vict., c. 26.

in existence at your death. The rule goes somewhat farther, but I would not advise you, without advice, to go beyond the line which I have marked out; and, indeed, without advice you will be more bold than wise to go even so far.

Where a man has a large family to provide for, it is often advisable to direct all his property to be turned into money, out of which he may order his debts and legacies to be first paid, and the residue to be laid out at interest in the names of trustees, for the benefit of his family.

Sometimes a man making his own will omits to name executors, which causes much trouble and considerable expense after his death.

As regards the will itself, the all-important point is to comply with the new statutes in the mode of executing your will.* Formerly there was a wide distinction between real and personal estate, for a devise of the former required three witnesses, while to a bequest of the latter no witness was required. Now, whatever is the nature of the property, two witnesses are required to every will or codicil. Every testamentary instrument is in this respect placed on the same footing. The first alteration of the law made hundreds of wills void; they were, when attempted to be proved, carried away in basketsful as valueless, simply because the testator's name was directed to be signed *at the foot or end of the will*, and upon this slight foundation it was decided, that if there was somewhat more room than enough for the signature between the end of the will and the actual signature, the will was void, so that at last it rather required a carpenter to measure the distance in each case than a judge to decide upon the application of the Act.

This great reproach to the law has been removed by

* 1 Vict., c. 26; 15 Vict., c. 24.

an act for which I am responsible, and it would be difficult now for a man to place his signature so as to render his will void, for it will be valid if the signature be so placed at or after, or following or under, or beside or opposite, to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will. And it will not be affected by any of the trifling circumstances which are enumerated, upon which men's wills had been set aside, and the enumeration of these circumstances is not to restrict the generality of the enactment; which clause has been overlooked by a learned person, who laments in print that the circumstances should have been enumerated, lest any may have been omitted. The Act has put an end to all difficulty.

But although the signature is properly placed, yet any disposition or direction which is underneath, or which follows the signature, will be inoperative, nor of course will the signature render valid any disposition or direction inserted after the signature shall be made.

But not to trouble you with nice distinctions, I advise you to make your will in the following manner:—Take care that if written on several separate sheets of paper, they are all fastened together, and that the pages are numbered. Sign your name at the bottom of each sheet, and state at the end of your will of how many pages your will consists. If there are any erasures or interlineations put your initials in the margin opposite to them, and notice them in the attestation. The attestation should be already written at the end of the will, and may be in this form:—

"Signed by the above-named testator, in the presence of us present at the same time, who have hereunto signed our names as witnesses thereto, in the presence of the

said testator, and in the presence of each other [the words interlined in the 4th line of the 3d page having been first added, and the erasures in the 7th and 8th lines in page 6 having been first made."]

The two persons intended to be the witnesses should be called in, and told that you desire them to witness your will, and then you should sign your name in their presence, and desire them each to look at the signature. Your signature should follow your will, but should precede the signatures of the witnesses, for if you were to sign after they have signed, your will would be void. When, therefore, you have signed, they should sign their names and residences at the foot of the attestation. You will observe, that according to the attestation, neither of the witnesses, although he has signed the attestation, should leave the room until the other witness has signed also. Remember that they must both sign in your presence, and therefore you should not allow them to go into another room to sign, or even into any recess, or any other part of the same room, where it is possible that you might not be able to see them sign. If, therefore, you do not choose them to sign after you at the same table or desk, have a table placed close to you before they come into the room, so as to create no confusion, at which they can and ought to sign before leaving the room. If you were to send your servant, who happened to be one of your intended witnesses, out of the room even for a table, he must leave the room before you sign. If after your death a question were to arise upon the fact of your having signed in the presence of both of the witnesses present at the same time, the man would of course admit that he left the room before you did sign, and then imagine what reliance would be placed upon that fact in cross-examination, and in the

address to the jury. The precaution which I recommend would prevent this difficulty from arising.

Even if you are ill and confined to your bed, you should have a table ready at your bedside at which the witnesses should sign after you, and you should not turn your back upon them whilst they are signing. These simple precautions will render it impossible to impeach your will for want of its due execution.

The actual law is, that no will shall be valid "unless it shall be in writing, and signed at the foot or end thereof by the testator, *or by some other person in his presence, and by his direction;* and such signature shall be made *or* acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator; *but no form of attestation shall be necessary.*" And the words, "at the foot or end," have been explained and extended by a later Act in the manner to which I have already referred, so as to render valid any common mode of signing a will.

You will observe, therefore, that if you cannot sign your name yourself, some other person may do so for you in your presence, and by your direction, but this should be noticed in the attestation. It will be no objection that the person signing for you is also one of the attesting witnesses. It has been decided, that where a person signed for the testator, but in his own name, stating it to be for the testator, and by his direction, the signature was a good one. You might, if you could not write, or did not choose to do so, sign by your **X** or mark, and so may the witnesses, if they cannot write; but to sign by a mark when you can write would be an act of folly, and if you can avoid it, do not have marksmen for witnesses. Although one of the witnesses is

unable to write, yet the other cannot sign for him; but in such a case the other witness may guide the hand of the witness unable to write, so as to enable him to write his name. It would, however, be more advisable to let a marksman affix his mark.

A husband cannot sign for his wife where they are the witnesses. A witness cannot, by going over his signature with a dry pen, give effect to it as a new signature; nor can he, by adding a further description to his place of residence mentioned in his original signature, give a new effect to that signature. You should attend to this if you have occasion to re-execute your will, and should require the witnesses to re-write their names as witnesses to the re-execution. I will presently explain to you the object of a re-execution of your will. The initials of the testator and of the former witnesses have been deemed sufficient to give effect to interlineations made in a will where they were opposite to the interlineations; but I recommend you in such a case to have all the names written at length. I have shown to you that there must be two witnesses to your will; but you may have more if you please, although I advise you to be content with two.

But although a witness cannot give effect to his signature by recognition, yet you will have observed that you, the maker of the will, may if you please sign your name in the absence of the witnesses, provided you acknowledge *your signature*, not merely the will, in their presence. *But the witnesses should see that the will is signed by you.* Pray attend to this: if you do not sign in their presence, point out your signature carefully to them, although you need not tell them that it is your will, but it is better to do so. If you were purposely to fold your will so as to conceal all its con-

tents and the attestation clause, and the witnesses were not to see you sign nor see your signature, the will would be void, although you acknowledged the paper to be your will before the witnesses.

But even gestures by a testator, intimating that he has signed the will, and wishes the witnesses to attest it, have been held sufficient where they saw the signature. A will, however, will not be set aside simply upon the infirm or confused recollection of witnesses. Their want of recollection where the will, on the face of it, is properly executed, will not have much weight. At a distance of time, persons not accustomed to witness the execution of instruments, forget nearly all that passed; therefore defective memory alone in witnesses cannot be allowed to overturn a will. The Court must first be satisfied that the will was not duly executed, and where the negative is not established, the affirmative must be held to be proved. Where a will was properly signed on the face of it, and two servants attested it, and the testatrix was writing when the first of them went into the room, although neither of them knew it was a will, or saw the testatrix sign, and she did not acknowledge her signature, yet as the paper was open, and they might have seen it, the will was established. If the witnesses disagree, and the one against the will is discredited, the evidence of the other, with corroborating circumstances, would support the will. If you follow the plain directions which I have given you, no such question could arise.

I have advised you to keep both of the witnesses present until they have both signed the attestation. This is not required by the statute, and after some doubt, it appears to be settled that it is not necessary, although I think it highly expedient, for it will impress

the matter more upon their minds; but do not fall into an error on this head. *You must* sign or acknowledge your signature in the presence of the two witnesses *present at the same time,* according to the very words of the statute.

I have furnished you with a formal attestation, *which will save both delay and expense in the proof of your will after your death;* but although the statute requires the witnesses to attest and subscribe the will, yet it declares that no form of attestation shall be necessary, so that no attestation clause whatever is required. If the witnesses sign as such, that is sufficient. The word "witnesses," for example, prefixed to their names at the end of the will, would be a compliance with the law.

The Act protects you against the incompetency of the witnesses to prove the execution of your will; so that although they may have been guilty of crimes, for example, which would formerly have excluded their evidence in common cases, yet that would not render your will invalid.* You would not, of course, if you were aware of it, allow persons of bad character to witness your will. Creditors or executors may prove a will to which they are attesting witnesses; but no person to whom you give a legacy, or to whose wife or husband you give one, should be a witness to your will; for although the testimony of such a witness would be good, the legacy to him or her, or to his or her wife or husband, would be void.

I have advised you not to lose sight of the witnesses until they have signed the attestation: on no account allow them to take the will out of the room where you are to sign it, or even to sign it in any part of the room where you cannot see them. The decisions on this

* See further, 6 & 7 Vict., c. 85.; 14 & 15 Vict., c. 99.

head reflect no credit on the law of England. It is, however, sufficient if the witnesses sign where you might see them ; it is not necessary to prove that you actually did see them. I have endeavoured, but in vain, to prevail upon Parliament to place the law upon this subject upon a better footing. Even in the case of a blind man, he is treated as if he could see, for the witnesses must sign where, if he enjoyed the organs of sight, he could see them !

In one case, where a lady went to her attorney's office to execute her will, but executed it in her carriage in the presence of the witnesses, who then returned into the office to attest it, the validity of the will was established, because the carriage was accidentally put back to the window of the office, through which, it was sworn by a person in the carriage, the lady might see what passed—that is, the witnesses signing the attestation. In another case of this nature, there was an unseemly contest between the Court of Chancery and the juries who had to try the validity of a will of a noble Duke, which depended upon the question whether the testator could see the witnesses who signed in an adjoining room. Two juries found in favour of the will, and yet the Court directed a third trial.

If you add a codicil to your will, you should call it a codicil, and should execute it, and have it attested, just as if it were an original will. Remember that you cannot give a single additional legacy without once more going through these ceremonies.

Do not make your will at intervals. If you do you must execute what you have written every time you leave off, and it must be attested just as if it were a full disposition, if you mean to give effect to it, although you should die before you finish your will. If you were to write several testamentary instruments on the same

sheet of paper, and sign them both, and the witnesses were actually witnesses to the signature to both, yet if *they* signed an attestation at the end of the first instrument, that would not render the second operative.

If you obliterate, interline, or make any other alteration in your will after it is executed, you must re-execute your will in like manner as if it were an original will; but it is only necessary that you should "sign your name, and the witnesses subscribe theirs in the margin, or on some other part of the will opposite or near to such alteration, or at the foot or end of, or opposite to, a memorandum, referring to such alteration, and written at the end or some other part of the will." If you neglect this direction, the alteration will not have any effect, except so far as the words or effect of the will before such alteration shall not be apparent; for if the obliteration is effectual, of course the disposition in the will as it originally stood cannot be made out; and where the intention is simply to revoke, and not to substitute another legacy for that given by the will, no evidence can be admitted to show what the words really were; but expert persons may be employed, and magnifying glasses may be used in order to make out the words.

Generally speaking, any alteration should be made by a regular codicil, and not by obliteration or interlineation. If there are any interlineations in your will unattested, it will be presumed that they were made *after* the execution of your will, and they consequently will be inoperative, although parol evidence may be received to show that they were made before the will was executed.

A codicil duly executed will make the will speak as of the date of the codicil, unless a contrary intention appears. So a will or a codicil not duly executed may be rendered

valid by a later codicil duly executed, and referring clearly to it, or in such a manner as to show the intention; therefore, if you were to begin your codicil, "This is a codicil to my last will," and there was only one will, those words would set up the will although not duly executed. But if you had several wills and codicils in your possession, and some were duly executed and some were not, and by a codicil duly executed you were expressly to confirm all your wills and codicils, this codicil would only confirm those which were duly executed; for they by themselves would satisfy the strict meaning of the words. This was decided in a contest for large legacies under dispositions by the late Marquess of Hertford. No doubt a harsh construction; but without perplexing you with other instances of a strict construction on this head, this may serve to point out to you how careful you should be in referring carefully to any unexecuted testamentary papers which you desire to render valid.

Although by a codicil, duly executed, you may set up a prior will, not duly executed, yet you cannot by a will, though duly executed, give validity to any future codicil you may make not duly executed.

I may observe to you, that if you have a *power* to dispose of any property *by your will*, which means a right to give it to another, although the property itself does not belong to you, and the will is required to be executed by you in a particular manner, or in the presence of a particular number of witnesses, or nothing is said on the subject, you must execute your will in exercise of the power precisely in the same mode as if you were disposing of your own property, and it is not necessary to observe the mode of execution required by the power itself.

I shall wind up this long letter by informing you that your wife cannot make a will unless of property settled to her separate use, or which she has power to dispose of by will, or of personal property with your consent, nor can any of your children make a will, as they are all under the age of twenty-one years ; although, until the late Act, an infant might have disposed by will of his personal estate.

LETTER XIX.

I NOW propose to inform you how you may revoke your will, or revive it after you have revoked it; and my observations will apply to codicils as well as to wills.

Your will, then, may be revoked by another will or codicil executed in the manner I have already pointed out, or by some writing declaring an intention to revoke it, and which must be executed in like manner; or by the burning, tearing, or otherwise destroying the same, by yourself, or by some person in your presence and by your direction, *with the intention of revoking the same.* As there must be an intention to revoke, if a testator, whilst of unsound mind, were to destroy his will, probate would be granted of the draft of the will; and destruction of the will by accident or mistake, if clearly proved, would not defeat the gifts, if the contents of the will could be shown. A man's will duly executed was found at his death with the signature of his name erased, but with another like signature just below where the original signature stood, and no explanation could be furnished, but the will was supported, as it was considered that the erasure was not made by the testator with an intention to revoke his will. You must be content with these instances.

But then you may revoke your will by burning, tearing, or otherwise destroying it, which enactment excludes the mode which was sanctioned by the former law, of cancellation, or striking the will through with a pen; therefore crossing out your name or the names of the witnesses is not a revocation.

But burning, tearing out, or cutting out your name from the will would be a revocation, for your will could not operate without your signature. The whole will would be destroyed by the removal of your signature. A will written in pencil would be destroyed by removing the words by india-rubber ; even obliteration may amount to a revocation, as where the testator obliterates his name so that it cannot be made out, or if he erases it in like manner with an intention to revoke. If, however, you intend to revoke your will, the safer way is wholly to destroy it. And if you have executed two parts of your will, take care and destroy both, although the destruction of one part *may*, under some circumstances, operate as the destruction of both. If you throw your will on the fire with an intention to revoke it, you should see that no one takes it off before it is burnt, for unless it is at least partially burnt, there will be no revocation.

There is still another act which will operate as a revocation of your will—your marriage after the execution of it, with an exception which would only perplex you ; and the same law applies to your wife, for marriage of either sex operates as an immediate and total revocation of a prior will. This ought to be universally known ; it is no improvement on the old law. When a man marries, he should immediately make a new will to meet the obligations which he has imposed upon himself. If he really mean his old will to stand, he must at once re-execute it or declare his intention by a codicil, and, I must always repeat, duly executed.

But no *presumption* of an intention on the ground of alteration of circumstances is allowed to revoke a will.

The Civilians carried the doctrine of presumption so far as to hold every will void in which the heir was not noticed, on the presumption that his father must have forgotten

him. From this, as Blackstone reasonably conjectures, has arisen that groundless vulgar error of the necessity of giving the heir a shilling, or some other nominal sum, to show that he was in the testator's remembrance. The practice is to be deprecated, as it wounds unnecessarily the feelings of a disinherited child. This you may say does not always happen. An assembled family, as the legacy to each was read aloud, sobbed and wished that the father had lived to enjoy his own fortune. At last came the bequest to his heir—"I give my eldest son Tom a shilling to buy him a rope to hang himself with." "God grant," says Tom, sobbing like the rest, "that my poor father had lived to enjoy it himself!"

There are now only four modes by which a will can be revoked. 1. By another inconsistent will or writing executed in the same manner as the original will. 2. By burning, or other act of the same nature. 3. By the disposition of the property by the testator in his lifetime; for of course that leaves nothing for the will to operate upon. 4. By marriage. By the 2d and 4th modes, the revocation, as I have already intimated, will be complete.

You may wish to revive your will *after you have revoked it;* this can only be accomplished by the re-execution of it, or by a codicil duly executed, *and showing an intention to revive it.* And therefore you should expressly declare that you intend to revive your will, and that it shall remain in full force in like manner as if it had not been revoked.

There is a provision as to revivals of revoked wills, which may puzzle you at first sight. "When any will or codicil which shall be partly revoked, and afterwards

wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, *unless an intention to the contrary shall be shown.*"

Let me explain this to you. Your will is made, and then by a codicil you revoke one of the legacies given by the will. You then make a second codicil, by which you *wholly* revoke the will; lastly, by a re-execution of the will, or by a codicil duly executed, you *revive* your will, without noticing your first codicil revoking the legacy: the consequence would be that the legacy would stand revoked, and would not be revived, although the rest of the will would be. If, therefore, in such a case you desire the gift to the legatee to revive also, you should expressly declare such to be your intention, and then every part of your will would be revived. Bear in mind, that these observations are confined to wills which have been already revoked, for where the will has not been revoked, a codicil duly executed would operate to give effect, if necessary, to the prior will as of the date of the execution of the codicil, unless a *contrary intention* appeared. There is one point of importance to which the attention of every man should be drawn. A will "which shall be in any manner revoked" will not be revived by the re-execution of the will, or by a codicil, unless "showing an intention to revive the same." Now marriage will operate as a revocation of a will, and that, I suppose, will be held to be within this clause. Well, a man marries after he has made his will, but is wholly unconscious that his marriage has revoked his will; he subsequently to his marriage makes a codicil giving a legacy; yet unless that codicil show an intention to revive the will, it will remain inoperative.

No conveyance or other act by you subsequently to

the execution of your will, in reference to any property comprised in it, except such an act as will revoke your will, will prevent the operation of your will with respect to such estate or interest in the property in question, as you shall have power to dispose of by will at your death. I must explain this to you: By your will you have given your estate in Sussex to one of your sons; now if you were, after your will, to convey that estate to another of your sons for his life, the estate would still, but subject to this life-estate, go under your will to the son to whom you devised it, without its being necessary for you to re-execute your will.

Your will, I must tell you, will be construed with reference to the real and personal estate comprised in it [that is, with reference to any gift in it of real or personal estate], to speak and take effect as if it had been executed immediately before your death, unless a contrary intention appear by your will. And, finally, every will re-executed, or republished,* or revived by any act, will, for the purposes of the Act of Parliament, be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived. All these are excellent provisions, and calculated to carry your testamentary intentions into effect.

* This word may require explanation. Formerly a will of real estate was required to be *published;* when new force was given to it—by re-execution, for example, it was *republished.* But publication had no precise meaning, and the necessity of it was taken away by the late Act. As, therefore, there is no longer a publication, there can, properly speaking, be no republication, and the framers of the Act supposed that the latter word would no longer be used; but so inveterate is habit, that the expression has found its way into the Act itself.

LETTER XX.

THIS is my last Letter on the subject of Wills. I have already pointed out to you how your will should be executed, and how it may be revoked, and how revived after revocation. I propose now to point out to you the operation which, by statute law, various dispositions in your will will have. There are enactments as to the effect of devises to trustees, to which I do not think it necessary to call your attention.

1. You may dispose by will of all your real and personal estate to which you may be entitled at the time of your death—property of every description, including copyhold and customary lands, although you may not have been admitted to them, or have not surrendered them to your will. And very general descriptions will pass copyholds and leaseholds, as well as freeholds. A general devise or bequest, too, will pass any real or personal estate which you have power to appoint in any manner you think proper; that is, to whom you think proper, and therefore a power to appoint to your children would not fall within this description. In both cases, however, as to copyholds and leaseholds, and as to property over which you have a general power, the property will not pass if a contrary intention appear by your will. You will observe, that if you devise all your real property generally, any subsequently-acquired real estate will pass by it without the necessity of any re-execution. If you intend to confine the operation of your gift, you should express that intention.

You may devise and bequeath any of your *expectancies*, and if they drop in in your lifetime they will pass by your will. Whatever, therefore, you may expect as heir-at-law, or next of kin, or devisee, or legatee of any living person, will pass by your will, if you bequeath it, and live to be entitled to it; and as to one interest, as I will presently point out to you, although you do not survive the testator. Although you have no real estate when you make your will, yet if you give all your real estate by it, any estate which you subsequently acquire by purchase or otherwise will pass by it without the necessity of a re-execution. In trusting to your will passing, without your re-executing it, any subsequently acquired property, be careful that *the words* are sufficient to pass it: for where an estate was devised by its name, "All my Quendon Hall estates in Essex," after-acquired property, although the testatrix had contracted to buy part of it before the will, and most of it consisted of small additions to the principal estate, was held not to pass, for the Court could not think that the testatrix intended to include it.

Do not, where it is not necessary, give any personal chattel specifically. This you cannot avoid, if you wish to give a particular watch, for example; but if you should sell or give it away, of course your bequest becomes inoperative, and no other watch that you may acquire can supply its place. In bequeathing your stock, give it generally, as all your funded property, or all your three per cents, or the like, and not the funds or three per cents which you have now in your name. It seems that if, having a brown horse, you were to bequeath it, and then to sell it and buy another brown horse, the latter would not pass.

If you devise an estate and afterwards sell it, the

devise, as I have stated to you in Letter III., will become revoked: should you re-purchase the same estate, I recommend you not to trust to your former gift, but to re-execute your will, or rather to execute a codicil, and confirm the gift in your will. I can give you an instance which will convince you how dangerous it is to deal with the property given by your will, without ascertaining what effect the disposition will have on the previous gift. Under a settlement on a marriage, the husband, in the event which happened of a failure of issue of the marriage, had a power to appoint the property to whom he pleased; and there was the usual power of sale in the settlement with the consent of the husband and wife (the nature of which power I have explained to you in Letter XVII.) The husband, by his will, appointed his interest in the estate to trustees to be sold, and gave the produce to persons named in his will. The estate itself was afterwards sold under the power in the settlement, and was conveyed to the purchaser, and then the husband died, and it was held that the gift in the will was void, and could not affect either the purchase-money of the settled estate, or the new estate to be purchased with it.

If formerly you gave any part of your real estate by your will which lapsed, as it is termed, that is, failed, by the death of the devisee in your lifetime, or the gift was for an illegal object, the devise failed altogether, and the property would go to your heir-at-law, although there was a *residuary* devise in your will, or, in other words, a devise of all the residue of your real estate to a person who survived you. As to personal estate, the law was always otherwise, and lapsed legacies fell into the residue as they still do. And now, by the new law,*

* 1 Vict., c. 26.

residuary devises of real estate are placed on the same footing as residuary bequests of personal estate; therefore the residuary gift of the real estate would carry to the residuary devisee an estate which lapsed by the death, in the lifetime of the testator, of the person to whom it was devised. So where a gift is to a charity of an estate, which is void, the estate will go to the residuary devisee. But this will not be so, if a contrary intention should appear by the will. It is not necessary for the residuary devisee to show that the testator intended, in the given event, that the estate should pass as part of the residue; but it is necessary for the heir-at-law, resisting the claim of the residuary devisee, to show, that by the declaration of the testator in the will, or from the frame of the devise, such was *not* his intention. It is seldom that any testator has any such intention. In making your will, if you do not intend your residuary devise to have this operation, state so distinctly. If you do intend it, then see that your residuary devise is open to no cavil, but will pass all the residuary estates of which you can dispose at your death.

No hatred is more intense than that which arises in a man's family after his death, where, under his will, the rights of each member of it are not separate and strictly defined. None is more afflicting or degrading to our common nature. We weep over the loss of our relative, and we quarrel over the division of his property. Be careful not to make an unwise or ill-considered disposition, particularly of your residue, upon which the contest generally arises. As you love your

family, pity them—throw not the apple of discord amongst them. If you leave to every one *separately* what you desire each to have, and give nothing amongst them all which requires division, and therefore selection and choice, peace and good-will will continue to reign amongst them.

Still further: in disposing of your residue, neither overrate nor underrate its value. It is a duty which you owe to yourself, and to those who are to succeed you, carefully to ascertain the value of your property. I know an instance of a person who succeeded to a great estate, simply by declining a particular legacy, in common with the general legatees—the mere gift of the residue would satisfy him—he begged the testator would not consider him until every other claim was satisfied! The residue greatly exceeded in value the aggregate amount of all the legacies.

On the other hand, it has frequently happened that a man over-estimating the value of his property, or not allowing for its depreciation, has given large legacies to all his children but one, and has reserved his residue for that one. At his death it has turned out that every one was well provided for except the chief object of his bounty, his residuary legatee. You can easily avoid this by giving to the child whom you mean to make your residuary legatee, equally with the rest, what you wish it at all events to possess, and then you can give to this child the residue. If your funds should fail, every legatee would have to abate in proportion, which would be what you intend. If there should be enough to answer all the legacies, the child taking the legacy and the residue would yet not take more than you intended. If you really mean one child to take its chance as to

the value of the residue, whether more or less, then of course my observations would not apply.

By the new law, an estate in fee will pass to a devisee without words of inheritance, just as a personal chattel will. If you give a man a horse, he takes it as his absolute property; and now, if you give him a house, he will take all your interest in it without any further words, unless a contrary intention appear by your will. To prevent such a construction, you should still, as of old, give the house to the devisee, *his heirs and assigns*, where you mean him to take the fee. If you intend him to take it for life only, you should not give it to him generally, but expressly for his life; and if you wish the devisee for life to have a power to cut timber, add, "without impeachment of waste."

If you give a country house, carefully specify what closes or lands you mean to go with it.

If you give an annuity charged on your real estate, you must still add words of inheritance to the gift; for example, "to him, his heirs and assigns," if you intend the devisee to take it beyond his life.

I must still bring two more provisions of the new law to your notice. Formerly, if you had devised your estate, for example, to one and the heirs-male of his body, which, as I have explained to you in Letter X., would create an estate in tail-male, and the devisee had died in your lifetime, the devise would have lapsed or failed altogether, although he left male issue living at his death. This never could be the intention, and it is now happily prevented. Therefore, where a contrary intention does not appear by the will, a devise of an estate tail will, although the devisee die in the testator's

lifetime, take effect as if his death had happened immediately *after* the testator's death, or, in other words, his issue, who would be inheritable under such entail, according to the words, will take the estate as tenant in tail.

The other provision is, that if you should give, by your will, any real or personal estate to any of your children or grandchildren, for any interest which will not determine at or before the death of such child or grandchild, and he or she shall die in your lifetime *leaving issue, and any such issue shall be living at your death*, the gift will not lapse, but will take effect, as if the death of the child or grandchild had happened immediately *after* your death, and therefore will form part, according to its quality, of the real or personal estate of the *deceased child or grandchild.* But this will not be so, if a contrary intention appear by the will. You should therefore consider whether you mean your gift to your children, and your children's children, to take effect if they die in your lifetime; and if you do not, you must say so. The provision, you will observe, does not apply to gifts which are not to endure beyond the life of the legatee; for of course in those cases there is an end of the gift whenever the legatee dies, whether before or after you. But keep in mind that the general gift in your will to your child, for example, will belong to him if you leave it unrevoked, and will pass by his will although he die in your lifetime, and will not belong to the children whose existence at your death prevented the legacy from lapsing.

The Act* which abolishes the old jurisdiction, and establishes a new Court of Probate, with District Courts and a limited jurisdiction in the County Courts, provides not only for the custody of your will after your death,

* 20 & 21 Vict., c. 77.

but directs that convenient depositories shall be provided, under the control of the Court, for all such wills of living persons as shall be deposited therein for safe custody; and that all persons may deposit their wills, in such depository, upon payment of such fees and under such regulations as the Judge of the Court shall by order direct. If you are likely, from time to time, to alter your will, I should advise you not to deposit it in this depository. If I were a devisee of a living testator, I should like to hear that the will was in the new depository. The expense and difficulty attending the getting a will out of this custody, would deter many men from capriciously altering their donations.

LETTER XXI.

THERE are few social questions of more importance than that which is the subject of this Letter—the relation between trustees and their *cestuis que* trust, as they are termed, or the persons for whom they are trustees. Property could not be enjoyed in the way in which we, husband and wife, parents and children, succeed to it, unless men could be prevailed upon to assume the office and undertake the duty of trustees. It is a true act of friendship to accept an onerous trust. In the creation of a trust, the person whose property is to be the subject of it, has to weigh well how far he can confide in the integrity of the proposed trustee — more especially where stock or railway shares, for example, are to be transferred into his name; and to guard as well against dishonesty as against death, or an inability or unwillingness to continue a trustee, more than one is generally appointed, with a power, in case of necessity, of appointing a new one. On the other hand, the proposed trustee has to reflect upon the liabilities which he will incur. The harsh rules of equity in making him answerable as for a breach of trust, where he has acted with perfect good faith, and according to the best of his judgment, although not strictly according to the trust, or perhaps not in accordance with some rule of equity of which he was ignorant, and upon which his trust-deed would not enlighten him, are calculated to alarm him; he may well hesitate, for he can hardly have lived long in society without meeting with some family whose prospects in life have been destroyed by an innocent error of the

head of the house in the execution of a trust. He will find, too, that unless his *cestuis que* trust are, *after* the creation of the trust, more reasonable than the generality of mankind, they will want to deal with the trust-property as if it belonged to them absolutely, and not merely as bound by the trust. Some men, although only tenants of life of the fund, desire to speculate with the trust-money or stock, just as if it were not settled; and if the trustee refuse to allow this, a coolness ensues between the parties, which threatens to sever the friendship between them. On the other hand, if the trustee allow this perpetual dealing with the trust-fund, although it may be strictly legal, it places the fund, and consequently himself, in constant danger. The money must be intrusted to brokers, agents, bankers, solicitors, and may inconsiderately, or unavoidably, be left in their hands for too long a period, or may be improperly retained, or even wasted or misappropriated by them, and then would arise the question of the liability of the trustee. He may be a great sufferer in the execution of his trust, but he cannot be a gainer, for equity will not allow a trustee to pay himself for his trouble, or in any manner to derive any benefit from the funds with which he is intrusted. And Parliament has prohibited him from voting in respect of his trust-estate, and vested the right in the *cestui que* trust in actual possession, or in the receipt of the rents, though he may receive them through the hands of the trustee.* Such considerations as these make prudent men hesitate to accept the office of a trustee; yet every man of property, in his turn, requires the offices of a friend, and thus relatives and friends are constantly in a manner forced to become trustees. But there is a growing disinclination to accept

* 6 Vict., c. 18. This was quite right, but it illustrates the manner in which every benefit is denied to a trustee.

the office, and several modes of avoiding the difficulty have been suggested or attempted.

One plan is, that a trustee shall be paid for his services, and then it is said that he cannot object to the liabilities which he will incur. Now this is altogether repugnant to our habits and feelings. The office is to be filled by a friend with whom we can communicate freely and confidentially, as with one who feels an interest in our family and its prospects. A paid trustee would stand in a different character, and the money allowed to him, in many instances, would find its way into the pockets of an agent. We should have to deal with him at arm's-length. We should dread his visits, or his journey to town, knowing that they would be charged for; every letter would form an item in a bill. A per-centage on the fund, which would be a heavy tax in all cases, would be accepted, in many without any feeling of responsibility to perform the duties of the office. If a man is to be paid, it must be for the duty actually performed, and that would render it necessary to make it a matter of charge and account. What man of right feeling would accept the office upon such terms? Undoubtedly there are men who, if payment were the rule, would make a trade of the office, and, like other tradesmen, endeavour to attract custom to their own mill.

To meet these objections, it was proposed by the South Sea Company, upon its dissolution, and also by a private company, to obtain powers from Parliament to enable them to carry on the business of trustees and executors, for which, of course, they were to be paid. They were defeated in this attempt. The trade of a Trustee! The business of an Executor! Fancy it written over a shop-door. If established, of course, the most rigid construction would be put upon trusts, so as to render the com-

pany safe, with constant references to counsel at the expense of the parties. Expense would be certain—benefits doubtful. Property would be promptly accepted, but not parted with without hesitation and rigid examination of proofs, leading to delay, and not unfrequently to a Chancery suit, the costs of which would undoubtedly fall on the claimants. Looking at the ordinary rules of equity in regard to the disposition of trust-funds, such a company could not exist without daily committing breaches of trust—for example, if £1000 three per cents of yours were to be transferred to them upon certain trusts, that sum would be added to their other like stock; there would be no earmark; the Bank would take no cognisance of the trusts; and all the stock of the company would stand in their name as one fund, although it might be composed of sums belonging separately to one hundred different families. When, therefore, they made any sale, no one could distinguish whether it was yours or another man's stock. Their own accounts would be kept separately, but that would not affect the actual dealing with the funds. Again, if £1000 in money were paid to the company upon trust to be invested, although it might in due time be invested, yet in the mean time it would be paid into their bankers, and form part of their general cash, and would unavoidably be used for their benefit; yet no private trustee could venture thus to deal with his trust-monies. But although these projects did not succeed, yet a private company of high character has been formed for the purpose of executing trusts and executorships, but *limited*. Such associations are not only open to all the objections which I have pointed out, but their *limited* liability would deter a prudent man from intrusting them with his fortune. A private trustee is liable to the extent of all his

means for any loss to the fund by his mismanagement, or breach of trust. And the examples of failures of joint-stock banking companies, even where the shareholders are liable to the full extent of their means, are too recent and alarming not to make men hesitate to rely upon any company as their trustees or executors.

How, then, you will probably ask, can we best support this important relation with safety to both parties. Parliament has made *fraudulent* trustees answerable criminally for their acts. As the bill was originally framed, I could not have agreed to it, as it appeared to me to expose honest trustees to new dangers; but as it ultimately passed, I supported it willingly, and I can assure you that neither you nor any other trustee acting with common honesty need fear its provisions. But, at the same time, while we punish dishonest trustees, we ought to relieve honest trustees from such of the rules in equity as press too hardly upon them. This I attempted to do last session, and the bill for that purpose passed the House of Lords, but was postponed in the House of Commons at the end of the session: no doubt that or some better measure for the relief of trustees will be passed in this session. I will by-and-by explain these measures to you. With these, and common precautions, I hope that the relation of trustee and *cestui que* trust may still be maintained without danger to the former, and with safety and benefit to the latter.

But I shall conclude this Letter with some advice how to avoid the dangers to which a trusteeship or executorship may expose you. Now, first, as to the trusts *which you have already accepted.* Without alarming your friends for whom you are a trustee, quietly look into the trusts, which you can generally manage without the aid of a solicitor, and see that the funds are secured and in-

vested according to the trusts, and that you are not paying more to a tenant for life than he is entitled to under the trust. This latter point is all-important, for it frequently happens that a trustee incurs a serious loss by paying to a tenant for life a larger income than equity would allow him. If, therefore, you are paying to any tenant for life the rent of a leasehold estate, or interest upon any fund yielding more than 3 per cent, ascertain that the leasehold ought to remain unsold, and the *rent* paid to the tenant for life, and that the funded property or money otherwise secured ought to remain in its present investment, and the interest paid to him. If the fund is a 3 per cent stock, you may safely go on paying the interest to the tenant for life without inquiry; for a 3 per cent stock is that which a court of equity always selects and approves of.

I will show you the danger to which you may be exposed in paying a large rate of interest to a tenant for life. An officer in the East Indies advanced £2000 to the Company on one of its loans at 10 per cent, redeemable at the end of ten years: he returned shortly afterwards to England, and ordered his interest on the £2000 to be paid to him in London, which he had power to do; he died in a short time, having bequeathed his property to a trustee to convert it into money and invest it in the usual way, and to pay the interest to his wife for life; and, after her death, to pay the principal to another lady. After his death, the trustee, finding the fund not payable for some years to come, although it might have been sold, followed the testator's example, and, leaving the money undisturbed, paid the 10 per cent to the tenant for life. In 1813 the loan was paid off by the Company, and the money was invested by the trustee in the 3 per cents, and it so happened, by a fall

in the funds, that with the money the trustee was enabled to purchase £826 stock beyond what would have been obtained had the trustee, as he ought in strictness to have done, sold the loan at the end of a year after the testator's death, and then invested the money: so that, in consequence of his neglect, the fund was increased by upwards of £800 stock. In 1820 the lady, then entitled to the fund, who had not before taken the trouble to inquire about the fund, filed a bill against the trustee for a breach of trust, and he was decreed to pay to her all that he had paid to the tenant for life beyond 3 per cent on the loan, amounting to upwards of £1000, and the Court positively refused to allow him to set off the £826 stock, the benefit which she obtained in consequence of the very act—viz. the delay in converting the fund, of which she complained. You will no doubt think this not very equitable, and one object of my bill is to prevent such an act of injustice; but this case will serve to show you the danger to which, as a trustee, you are exposed, if you do not convert property in due time.

Do not lay out your trust-money on mortgage, unless you have power to do so; for if you do, and there should be a loss, you might be made responsible. The usual mode of authorising a loan on mortgage is to empower the investment of it "on real securities."

Consider yourself always responsible for the receipt or payment of the trust-money. See, therefore, that the money is paid to the right hand, and in like manner, when paid off, receive it yourself. Upon advancing money upon mortgage, personally pay the money to the mortgagor, and see the deed properly executed; when it is paid off, attend and receive the money at the time of executing the reconveyance. There is danger in executing the deed and signing the receipt without at the same time receiv-

ing the money. This precaution will no doubt give you trouble, but it may preserve you and your family from litigation and heavy loss. You will be safe if, pending a transaction for the investment of the money, you pay it to regular bankers, though they should fail; but never pay trust-money into your general account, but to a separate account, as trustee; and be scrupulous in drawing upon that account for the trust only. You would expose yourself to liability to interest or profit if you used the money as your own.

Never allow the money to be received, or, if that cannot be avoided, to be retained by brokers, agents, or solicitors. If you have a co-trustee who is a solicitor, unless you repose confidence in him, you should, upon lending the money upon any security, employ a solicitor of your own. It is only the other day that one trustee sold the trust-stock and gave the money to his co-trustee, a solicitor, to invest upon a mortgage to be obtained from a client of the co-trustee's; the latter *fraudulently* obtained a mortgage to both for the money from the client, and the mortgage was set aside as against *both* the trustees, so that the honest trustee had been a party to an act by which the money was lost. You may be safe in allowing your co-trustee to receive the trust-money, if you join in the receipt of it only for the sake of conformity, but it is dangerous to do so, and it is always better to have it paid into a banker's you can rely upon in your joint names. If you permit your co-trustee to receive it, you must look sharply after it, for you will not be absolved from seeing that it is in due time applied according to the trusts. Where one of three trustees was a solicitor, and acted in the trust as solicitor for himself and the other trustees, and was allowed to receive the purchase-money for an estate which they sold, and for

which they all gave a receipt, it was held that the solicitor received the money, not in that character, but in the character of trustee.

In a case of real difficulty, you should be careful how you act under counsel's opinion, for if you are wrongly advised, and act accordingly, you will be responsible. And now, as I shall explain to you in my next and last Letter on this subject, you may in a summary, and comparatively with former proceedings, an inexpensive mode, obtain the opinion of the Court of Chancery on the rights of the parties. Following literally the words of your trust will not always be safe: for instance, although you were empowered to lend the trust-money on real or personal security, and are declared not to be responsible for any loss, yet it would not be safe to lend the money to a trader, and of course not to any one in doubtful circumstances, to your knowledge.

It is desirable also that you should ascertain that the securities vested in you have had legal validity given to them as far as you can insure it. Upon a marriage, a mother assigned an *unregistered* judgment to a trustee for her daughter for life, and the judgment had remained unregistered about a year and a half before it was thus assigned; now to give full effect to the judgment, it ought to have been registered. The trustee naturally left the security as he found it, and a loss having been sustained by the non-registry of it, he was compelled to make it good. This shows the necessity of requiring, when you accept a trust, all the securities vested in you to have every legal validity given to them of which their nature admits. Of this you cannot be a judge, but you should impress the necessity of this step on your solicitor.

The advice which I have given to you in your character of a trustee will apply equally to your conduct in the

office of an executor. But in the latter character, you must be careful in your expenditure on the funeral, for if you are not careful, and the assets run short, you may have to pay the greater portion of them yourself. You should, of course, see whether the testator has himself given directions in his will about the nature or expense of his funeral, which should be complied with as far as his property will justify a compliance with his wishes. You should be careful not to leave any money outstanding upon personal security — note of hand or bond — for although the testator himself lent it upon that security, and so let it remain, yet it will be your duty to enforce payment of it: nor can you justify neglecting to bring an action for a debt where there is a probability of its being paid. You should see that rents to which, as executor, you are entitled, are duly brought into your account: you cannot excuse yourself by allowing one of the *cestuis que* trust to act as collector.

It is not my object to point out to you how the assets or property of the testator are to be disposed of, for all that I could explain to you within the compass of my undertaking is sufficiently known to you, and to all men; and for anything beyond that, you must necessarily act under legal advice. But there is one difficulty to which I must advert. When the debts are all paid, as far as you can ascertain by advertisements and inquiries, the legatees or next of kin will require the residue to be paid to them. You will, of course, be entitled to an indemnity against any demand which still binds you; for example, future rent under a lease to the testator. But you will be liable to any creditor who remains unpaid, although you advertised fully, and he brought in no claim until after you had paid over the residue to the legatees or next of kin. You may have

done all that the Court of Chancery would itself do, if a bill were filed to have the assets administered by the Court, in which case payment, with the sanction of the Court, to the legatees or next of kin, would free you from all liability to any unpaid creditors ; and yet the Court, if you act on your own authority, will compel you to pay the unpaid creditors. This, as the law stands, renders it necessary that you should, where there is any reason to suppose that there are any outstanding debts, either act under the direction of the Court, or require a satisfactory indemnity from the persons to whom you pay the residue.

I have only to caution you not to pay any money to any person under a power of attorney from the person entitled to receive it from you, until you are satisfied that he is alive when you make the payment, which, no doubt, it will often be difficult if not impossible to prove. But if he should have died before you pay the money, you may be compelled to repay it : for this, however, I hope to find a remedy.

Where a pecuniary or residuary legatee is abroad, an executor or administrator may pay the legacy or residue, after deducting the duty, into the Bank, with the privity of the accountant-general of the Court of Chancery, by whom it will be invested in the 3 per cents for the legatee, who may obtain it upon a summary application to the Court of Chancery.* Or a receipt for it may be signed abroad, and stamped, within twenty-one days after it is received in this country,† and can then be acted upon by arrangement between the parties.

* 36 Geo. III., c. 52. † 48 Geo. III., c. 149.

LETTER XXII.

I HAVE already told you that a legislative power has been given to our criminal courts to punish fraudulent trustees. The enactment is, "that if any person, being a trustee for the benefit, either wholly or partially, of some other person, or for any public or charitable purpose, shall, *with intent to defraud,* convert or appropriate the same, or any part thereof, to or for his own use or purposes, or shall, *with intent aforesaid,* otherwise dispose of or destroy such property, or any part thereof, he shall be guilty of a misdemeanour;" but no prosecution for the offence is to be commenced without the sanction of the Attorney-General, or, if the office be vacant, of the Solicitor-General.* If any *civil* proceeding shall have been *first* taken against the trustee, then no person who shall have taken such civil proceeding can commence any prosecution under the Act, without the sanction of the court or judge before whom it has been laid or shall be pending.

This provision applies only to a *trustee* on some express trust created by some deed, will, or instrument in writing; but it includes the heir and personal representative of any such trustee, and also all executors and administrators, liquidators under the Joint Stock Companies Act, and all assignees in bankruptcy and insolvency.

The *property* protected by the Act includes every

* This seems to be the meaning of the statute, but it is obscurely worded.

description of real and personal property, goods, raw or other materials, money, debts, and legacies, and all deeds and instruments relating to the right to any property, or giving a right to receive any money or goods, and also includes not only such real and personal property as may have been the original subject of a trust, but also any real or personal property into which the same may have been converted or exchanged, and the proceeds thereof, and anything acquired by such proceeds.

The same guilt is attached to any banker, merchant, broker, or agent intrusted for safe custody with the property of any other person, who shall, *with intent to defraud*, sell, negotiate, transfer, pledge, or in any manner convert or appropriate to or for his own use such property, or any part thereof.

In like manner, any person intrusted with any power of attorney for the sale or transfer of any property, who shall fraudulently sell or transfer, or otherwise convert such property, or any part thereof, to his own use or benefit, will be guilty of a misdemeanour.

And any person receiving any chattel, money, or valuable security, which shall have been so fraudulently disposed of, as to render the party disposing thereof guilty of a misdemeanour under the Act, *knowing the same to have been so fraudulently disposed of*, will be guilty of a misdemeanour.

The punishment of a guilty person is at the discretion of the Court—penal servitude for three years, or such other punishment by imprisonment for not more than two years, with or without hard labour, or by fine, as the Court shall award.

Persons are bound in all civil courts to answer fully, and make a complete discovery ; but their answers cannot be used against them in proceedings to punish them

under the Act. No legal or equitable remedies against the wrongdoer are to be impeached by his conviction, or any proceeding under the Act; but his conviction cannot be received in any action or suit against him; nor will any agreement by, or security given by, any trustee, having for its object the restoration or repayment of any trust-property misappropriated, be prejudiced by the Act.

This important statute cannot be too generally circulated. Whilst it inflicts a severe punishment on a fraudulent trustee, it guards against a malicious or unfounded prosecution, and enables all men to prosecute any banker, merchant, broker, attorney, or agent who shall act fraudulently with regard to trust property. There are other important provisions, relating principally to directors, &c. of corporations and public companies, over which they would do well "to ponder and pause," but which are not pertinent to the objects of this correspondence.

On the other hand, Parliament has provided for the relief of trustees where they are desirous of being relieved from the responsibility of administering their trust-funds.* Under this provision all trustees, executors, administrators, or other persons, *or the major part of them*, may, in a summary manner, and without filing a bill, pay the trust-moneys, or transfer the funds into the Court of Chancery; and the Court is empowered in a summary way to direct the application of the money or funds upon the application of the parties entitled. But the Court may, if they deem it necessary, direct a suit to be instituted for the administration of the trusts. Power is given to the Court to enable *the majority* of the trustees, &c. to pay or transfer the money or funds

* 10 & 11 Vict., c. 96; 12 & 13 Vict., c. 74.

into Court, if, upon a petition presented under the Act, it shall appear that for any reason the concurrence of the others of them cannot be had.

If the relief thus afforded to a trustee should be abused, the Court has power to visit him with costs. No one who has accepted a trust should wantonly resort to this mode of getting rid of it. When the fund is paid into Court, the trustee has no longer any power over it ; and although he might have withheld the fund until his accounts were settled, yet after payment of it into Court, he cannot obtain an order to stop the payment of it to the person entitled, although the latter intends to file a bill against the trustee for an account beyond the money paid into Court.

If the trustee act properly, he will be entitled to his costs ; of course he is entitled to have his accounts settled, and a release or discharge given to him. If that is refused, or there is any dispute between the parties entitled to the fund, or the like, he may safely pay it into Court under the Act. Where there is a dispute as to the amount due to him, and he pays what he considers the right sum into Court, he does so at the peril of costs, and of having a bill filed against him by his *cestui que* trust for an account. The trustee may himself file a bill for an account and a release, although this is a step which is seldom necessary or advisable.

By another Act* executors and administrators, and trustees, are empowered to join with all other parties interested in taking the opinion of the Court of Equity on a special case stated, and in acting upon the decree of the Court, without the property being administered by the Court. This provision was well calculated to save expense and time, but it has of late not been much

* 13 & 14 Vict., c. 35.

resorted to, inasmuch as all parties must concur in the case as stated, and they are seldom agreed upon the facts.

And the Court is authorised, upon the application of executors or administrators, after the lapse of a year from the death of the deceased, by motion or petition, of course, to take an account of the debts, and to provide for the payment of contingent debts; and when any other debts found to be due are paid, the executors or administrators are absolved from all further liability. This at the time was a great boon, as it enabled executors and administrators in a summary way to ascertain whether there were any outstanding liabilities, without giving to the Court the power to administer the estate; but it is not so important now that the regular proceedings in the Court of Chancery are rendered so much more simple than they were.

In regard to the Charities of which you are a trustee, I must refer you to the statutes for the better administration of Charitable Trusts,* where you will see what acts you may do under the authority of the Board of Commissioners, and what control they have over you. There is an important provision which enables trustees of any charity to apply to the Board for their opinion, advice, or direction respecting the charity, or the property, or any question or dispute relating to it. The opinion or advice is to be in writing, signed by two or more of the Commissioners, and sealed with the seal of the Commission. If you act according to this opinion or advice, you will be deemed to have acted according to your trust as far as respects your own responsibility; but the Act will not indemnify you if you were to be guilty of any fraud, or wilful concealment or misrepresentation, in obtaining such opinion or advice.

* 16 & 17 Vict., c. 137; 18 & 19 Vict., c. 124.

It remains only for me to state to you the heads of the Bill for the Relief of Trustees, to which I have already referred, and which, or a better bill, will no doubt pass this session. The proposed enactments are—that,

I. Where upon a breach of trust (the trustee, &c. acting with good faith) there is both a profit and a loss on the transaction, the one is to be set off against the other. The necessity for this provision is shown by the decision in the case which I have already stated to you (p. 164).

II. Payments and acts by any trustee, executor, or administrator, under a power of attorney, are to be valid, although the person who gave the power was dead at the time of the payment or act, provided the trustee, &c. was ignorant of the death.

III. Investments under the opinion of one of the Conveyancing Counsel will render the trustee, &c. safe.

IV. Gross negligence only to charge a trustee, &c. for neglect, where a testator has not directed the act to be done, although by the rules of equity it ought to have been done.

V. Trustee, &c. not to be liable for omitting to sue for a debt where there was reason to believe the action would have been useless.

VI. Trustee, &c. not to be liable for omission to sue on any bond or other personal security where the testator lent the money and did not call it in, unless required to do so by the persons entitled to the money.

VII. Provision for releasing executors and administrators from liabilities to rents and covenants under leases.

VIII. Executors and administrators to be indemnified where they have acted in the distribution of the assets, as the Court would have done if a bill had been filed.

IX. Trustees, executors, and administrators, authorised in a summary way to apply for and act upon the advice of a judge in equity on any question respecting the management or administration of the trust property or the assets of any testator.

X. But no breach of trust or duty is to be protected where the trustee, executor, or administrator, either directly or indirectly, derives from the act or matter constituting such breach of trust any personal benefit.

If any of these provisions should pass into a law, you will not have much difficulty in ascertaining from which of the dangers pointed out in my last Letter you will be relieved in your character of a trustee.

LETTER XXIII.

You are aware, no doubt, that no real property, lands or houses, can pass otherwise than by grant by deed for money, or for some good consideration, blood or friendship for example, for you may convey away your estate to whom you please; or by descent or devise, whereas mere personal property will pass by delivery from hand to hand. But yet there is a mode in which a man may acquire real property without paying for it or receiving it as a gift, or inheriting it by descent. This, at first sight, may appear singular to you. It is by what I may call *adverse possession*, which now is a possession by a person not the owner during a certain number of years without acknowledgment of the right of the real owner, and yet not necessarily in open defiance of him. In all times, great weight has been given to long-continued possession, in order to put a period to litigation. With us, the periods and nature of the possession depend altogether on acts of the Legislature,* and now even charities may be bound by nonclaim. Constant claims are set up to the estates of other men by poor and ignorant, and sometimes by crafty persons, although generally the latter support the claims of the former, where they think they can work upon the credulity of mankind. Some remarkable instances of fraudulent claims which have happened in recent times will recur to your memory. I call your recollection to them in order to guard you against such frauds; for these claims, when specious

* 3 & 4 Will. IV., c. 27.

ones, are made the subject of bargains and wagers in the city, and the claimants held up as persons who have been stripped of their rights by the wealthy, and are deserving of public sympathy. I have myself seen an office open for a considerable period in a great thoroughfare in the immediate vicinity of Westminster Hall, for the sale of shares in an estate claimed by a person who, to meet the expenses of law proceedings, was willing to allow subscribers to participate *largely* in the profits of the estate when acquired. Great numbers of persons were cheated by this scheme, which was clearly an illegal one. And, in point of fact, to my knowledge, the right to the estate in question had, long before this sale of shares in it, been the subject of litigation, and had been adjudged to belong to persons whose right to it could not be disputed by further litigation. You will quickly see how impossible it is that any really stale claim can succeed. When the time has arrived that bars the remedy, the right of the claimant out of possession is actually extinguished, and even the rights of the Crown may be extinguished by continued possession.*

The common remedy is now by the action of ejectment, which simple remedy is a great relief to the subject, and the common time for asserting the right of action is 20 years. The claimant's remedy, therefore, will be barred by mere possession by another, without payment of rent or acknowledgment, if his right of entry accrued above 20 years before the ejectment.

If the right of entry *first* belongs to you ; for example, if you are in possession of the property, or in receipt of the profits, and discontinue such possession or receipt, the 20 years will begin to run from such discontinuance. Where there has been no possession or receipt under a

* 9 Geo. III., c. 16, English Act ; 48 Geo. III., c. 47, Irish Act.

conveyance of the possession, the time runs from the period when the grantee became entitled to possession under the deed.

If the right does not first accrue to you, but to some person through whom you claim, time will in like manner run from the period when the right first accrued to such person: for example, if your father had been in possession or in receipt of the property or rent, and had discontinued such possession, and then died, leaving you his heir, time would run against you from the period of such discontinuance by your father; and so in like cases.

If your father had been in possession at his death, and had left you his heir, and a stranger entered, time would run against you from your father's death. If a rent or an annuity be left to you by will, and you neglect to receive it, 20 years will bar you, counting from the period when you first had a right to distrain for it.

If you were entitled in remainder—for example, if by will property were given to one for life, and after his death to you, time will not run against you until your remainder became an estate in possession by the death of the tenant for life. Upon this head there are very nice distinctions, with which I will not perplex you.

You should be told that the term discontinuance of possession means an abandonment of possession by one person, *followed by the actual possession of another person*, otherwise there would be no person in whose favour time would run; therefore, for example, if you were to sell part of your estate, reserving the unopened mines with a right of entry, 20 years' neglect would not bar you, but you might exercise your right at any period.

Where the person in possession is a tenant, and holds without regard to his landlord, the law applies itself to various cases. 1. Tenancy *at will*, as it is termed, for example, a purchaser let into possession before obtaining his conveyance and paying the purchase-money; time runs at the determination of the tenancy, or at the expiration of one year after the commencement of the tenancy, when it is to be deemed to have determined.

2. When the tenancy is from year to year, or other period, *without a lease in writing*, your right of entry as landlord would accrue at the end of the first of such years, or at the last receipt of rent (which shall last happen), and from that period time might run against you if you neglected your claim as a landlord.

3. Where the tenancy is *under* a lease in writing at £20 or upwards rent, and a wrongful claimant of the reversion receives it, and no payment of rent is afterwards made to you as the rightful landlord, your right would be held to accrue when the rent was *first* received by the third party, and no new right would vest in you on the determination of the lease; so that by mere neglect to receive your rent, and another person stepping in and receiving it, you would be barred of all relief at the end of 20 years. Mere non-payment of rent, however, will not bar you, nor will this law apply to a lease upon which no rent is reserved. So that in such cases you would be entitled to recover at the end of the lease. The Act of Parliament does not extend this provision to other leases in writing; therefore, when the rent is under £20 a-year, the mere receipt of it by a stranger will not make time run against the landlord.

If the person in possession or receipt of the profits acknowledges to you or your agent in writing, signed by him, your title, then in law his possession is yours,

and time will run against you only from the period when such acknowledgment was given, or the last, if more than one is given; and an acknowledgment signed by an agent would be effectual.*

There are savings, although the 20 years have expired, for infants, married women, lunatics, or absentees beyond seas, for 10 years after the disability has ceased of the person to whom the right *first* accrued, or until his death, which shall first happen. But a succession of disabilities does not extend the time, and 40 years are, with the exception which I will state to you, an absolute bar to all, though the disability has not been removed, or the 10 years allowed for disabilities have not expired.

But the 20 years are the regular bar, and the savings for disabilities are the exception, in even which case not more than 40 years are allowed in all. But the 20 years allowed may carry the right beyond 40 years; for if, for example, you are tenant for life, and your son is entitled in remainder after your death, as the 20 years will only run from the time when the right first accrues, in your case it will not commence running until your death, when his right begins, and you may live for more than 40 years from the time when the estate was settled.

These provisions, as I have remarked elsewhere, place landed proprietors in danger of rapidly losing portions of their property, particularly where they have allowed friends or dependants to occupy parts without payment of any rent. In many cases it will be found that the statute has transferred the fee-simple to the occupier. Where 20 years have not already elapsed, written acknowledgments should be immediately obtained from all such occupiers, signed by them. And in every case

* 19 & 20 Vict., c. 97, s. 13.

in which you allow another person to occupy any part of your estate without paying rent, or to receive any part of your rents without account, not only should you obtain a written acknowledgment of title to be signed by such person, but you should require a renewal of it every year, just as you would payment of rent; for, oddly enough, the time will begin to run against you the moment *after* the person in possession has acknowledged your title, so that, even when an annual acknowledgment is taken, with the exception of a momentary interval, *time will always be running against you*, although every renewed acknowledgment renders it necessary to begin a new computation of the 20 years. If you were to postpone calling for an acknowledgment for 5 or 10 years, it would probably escape your recollection altogether, and yet you might be in constant intercourse with the person whom you kindly let into possession, and who may yet ultimately claim the property as his own.

Part of your estates is vested in trustees, expressly in trust for you, and as between you and your trustees you are in no danger of being barred by time, unless indeed they should convey your property to a purchaser for valuable consideration, from which act, time would begin to run against you as regards the purchaser, and any person claiming under him. But the trustees themselves may be in danger of being barred; for 20 years' possession by a third person will bar both you and them. *Your* possession, however, would not be adverse to your trustees; and whilst their right continues, yours is safe.

It would only perplex you if I were to state to you how the law bears upon estates-tail, the nature of whose tenancy I have explained to you in my Tenth Letter; but I may mention, that if you, as tenant in tail, which you are of part of your property, were to neglect to pursue

your claim against a person in possession, without acknowledgment of your title for 20 years, your children and your children's children would be barred as well as yourself. Your neglect would bar them, and indeed would equally bar remainder-men claiming to take after your estate-tail.

Your remedy in equity, where your right is an equitable one, for recovery of the property withheld from you, is placed on the same footing in regard to time as your legal remedies. The distinction, in a general sense, between your legal and equitable interests is, that where an estate is conveyed directly to yourself, you have the legal right to it. Where it is conveyed so as to vest in another the legal right, but in trust for you, you are the equitable owner of your property.

If there is a *concealed fraud*, the remedy in equity, except as against any *bonâ fide* purchaser for valuable consideration, without notice, and no party to the fraud, will not be considered to accrue until the fraud shall, or with reasonable diligence might, have been first discovered. This has been explained not to mean the case of a party entering wrongfully; it means a case of designed fraud, by which a party, knowing to whom the right belongs, conceals the circumstances proving that right, and by means of such concealment enables himself to enter and hold.

I may still observe, that time runs against an administrator from the testator's death. A party relying upon possession cannot avail himself of the possession of a joint-tenant or tenant in common.

LETTER XXIV.

My last Letter relates to adverse possession of the estate itself, but a limitation has also been put upon proceedings to recover *charges* on the estate. Neither action nor suit can be brought to recover any money secured by mortgage,* judgment, or lien, or otherwise, charged upon any estate or any legacy (which, however, extends to legacies although payable out of personal estate only), but within twenty years, unless in the mean time some part of the money or interest has been paid, or some acknowledgment of the right to it shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled to it, or his agent, and in such case the twenty years are to run from the last of such payments or acknowledgments, but the time will not begin to run until next after a present right to receive the money has accrued to some person capable of giving a discharge for it. This is an important condition ; for instance, if you, as tenant for life of your estates, were to pay off a charge upon it, but to take no step to keep it alive, and you were to live more than twenty years after the payment, yet the right to the charge would not be barred, for there would be no assignable person liable to pay it in your lifetime, and the rent out of which the interest of the charge was to be paid belonged to you, who were entitled to the interest. You would be both the hand to pay and to re-

* In Letter Fourteenth (on Mortgages), I have stated to you the operation of adverse possession on such securities.

ceive. When a judgment is entered upon a post obit bond, time will not begin to run until after the death of the life, on the dropping of which the payment depends.

That part of the statute which requires an *acknowledgment* in writing to save time running, has received a liberal interpretation in favour of the claimant.

These provisions apply to the principal sums charged. *Arrears* of dower cannot be recovered for more than six years next before the action or suit. And no *arrears* of rent or of interest of any money charged upon any land, or in respect of any legacy, can be recovered but within six years next after the same became due, or next after an acknowledgment of the same in writing has been given to the person entitled thereto, or his agent, signed by the person entitled thereto or his agent; with an exception, nevertheless, in favour of the creditor where a prior encumbrance has been in possession within one year before the action or suit.

This provision extends to interest on judgments, as well as to interest on mortgages, and if the remedy is barred against the real estate, the bar applies equally to any remedy against the personal estate of the debtor. There is still a further provision under another Act of Parliament,* which was passed about the same time as the 3 & 4 W. IV., c. 27, to which I have already so amply referred, and which comes in aid sometimes of the latter statute. It is provided that all actions of debt *for rent* upon an indenture of demise, and all actions of covenant or debt upon any *bond*, or other specialty, shall be sued within twenty years after the cause of such actions. It contains savings in case of disabilities, with the nature

* 3 & 4 Will. IV., c. 42. Unfortunately, the framers of the two Acts were ignorant of each other's labours.

of which you are already well informed, and it gives effect to acknowledgments in writing, and part payments of any principal or interest, but it so far differs from a former provision that, although it requires the acknowledgment to be made and signed by the party liable, or his agent, it does not require it to be made to the person entitled or his agent. But there are some nice distinctions on this head.

Where an estate of a deceased debtor is liable to a bond debt, which binds the heir, and the estate is settled on one for life, with remainders over after his death, payment of interest on the bond by the tenant for life, will keep alive the creditor's remedy against the remainder-men after the death of the tenant for life. You will probably think this quite right.

LETTER XXV.

THIS Letter concludes my observations on Rights acquired by Possession.

As to your Church patronage, I may just notice that no advowson can be recovered by any person after three clerks in succession have held the same adversely, if the times of such incumbencies together shall amount to 60 years, and if not, then after the expiration of such further time as with the time of such incumbencies will make up the period of 60 years. No man, therefore, with ordinary vigilance, can be deprived of his advowson by an adverse enjoyment.

The statute law * also provides for the claims to light, rights of common and rights of way, and other similar rights.

1. Where the access and use of light for any house or building has been actually enjoyed therewith for 20 years *without interruption*, the right becomes absolute and indefeasible, unless it was enjoyed by consent or agreement expressly given or made by deed or writing; and there is no saving for disabilities. The right, therefore, wholly depends upon enjoyment, and it is not required that the person enjoying it should have claimed a right to it; indeed, as it has been justly observed, every person has a right to all the light which comes to him. You should keep in view this distinction between the right to light, and rights of common and of way, or the like. But the Act converts into a right such an enjoyment only

* 2 & 3 Will. IV., c. 71.

of the access of light over contiguous land as has been had for the whole 20 years *in the character of an easement,* distinct from the enjoyment of the land itself. This may require explanation: A house and garden were always in the possession of the same person, and the access of light to the house was over the garden, and the garden was held under a yearly tenancy, consequently, the enjoyment for 20 years *during the tenancy,* which was by virtue of the tenancy, was held not to establish the right. As to an interruption of the enjoyment, that will have no effect, unless it has been submitted to for one year after the party interrupted had notice thereof, and of the person making or authorising the same to be made. The interruption has been said to mean some physical interruption. It means an interruption by the owner of the *locus in quo.*

2. Rights of common and other profits and benefits to be taken or enjoyed from or upon any land (except tithes, rents, and services), which have been enjoyed for 30 years by any person *claiming right thereto* (in that respect distinguishing them from light), without interruption, cannot be defeated, by only showing, according to the old law, that the right has not been enjoyed from time immemorial, for actual enjoyment for 30 years is now allowed as an equivalent, so that no presumption is admissible; but the claim may be defeated in any *other* way, in which it might have been defeated before the new Act; for example, by proof of a grant or license, written or parol, for a limited period, comprising the whole or part of the 30 years, or the absence or ignorance of the parties interested in opposing the claim, and their agents during the whole time it was exercised.

When the right has been enjoyed, as already described,

for 60 years, it becomes indefeasible, unless it was taken and enjoyed by some consent or agreement, expressly given or made by deed or writing. There is, however, this important distinction between the 30 years and the 60 years' enjoyment: for the 60 years work an indefeasible title, but during the 30 years, the time is excluded in the computation during which the person capable of resisting the claim is an infant, lunatic, *feme covert*, or *tenant for life*, or during the pendency of any action or suit diligently prosecuted. During the period of a tenancy for life, therefore, the exercise of the right will not affect the fee; in order to accomplish that, there must be that period of enjoyment against an owner in fee; but the time of the disability and litigation, and of the tenancy for life, is to be excluded in the computation, and will not prevent the operation of the full period after it is excluded. The pendency of a tenancy for years is not directed to be excluded in the computation.

The enjoyment is to be as of right for the whole period, therefore asking leave, obtained from time to time within the period, breaks the continuity of the enjoyment as of right, because each asking of leave is an admission that, at that time, the asker had no right. So an enjoyment during unity of possession—that is, where the land and the right exercised over it are in the same person, is not sufficient to establish the right, for there no person can complain of the enjoyment, and the interval during which there was no sufficient enjoyment by reason of the unity of possession, cannot merely be excluded from the computation, but may defeat the claim altogether, by breaking the continuity of the enjoyment for the prescribed period before the action was brought.

If the claimant, where there is no unity of possession, ceases to exercise his right, that admits of explanation—for example, if a commoner were to cease to use the common for 2 years of the 30, because he had no commonable cattle, but used it before and after, the jury may find a continual enjoyment for 30 years, provided the proof covers the 30 years. So obstruction or interruption, from natural causes, over which the party could have no control, will not operate to his prejudice, as in the case of water, or the accident of a dry season.

3. Rights of way or other easement, or any watercourse, or the use of any water, are placed on exactly the same footing as rights of common, except that 20 years is substituted for the 30 years, and 40 years for the 60 years; but in all other respects there must be the like enjoyment, and with the same liabilities, and ultimately with the same absolute title as in the former case. But with this difference that as to the 40 years, establishing an absolute right, it is provided, that when the land or water over which any such way or other easement,* watercourse, or use of water, has been enjoyed or derived, has been held for life, or years exceeding 3 years from the granting thereof, the time of the enjoyment, during the continuance of such term, shall be excluded in the computation of the 40 years, in case the claim shall, within three years next after the determination of such term, be resisted by the reversioner. Here again, therefore, the time is excluded, and does not defeat the claim by breaking the continuity of the enjoyment. But observe that this applies to the 40 years only, and not to the 20 years' enjoyment.

* The word in the statute is "convenient;" but that is evidently a mistake.

The object of this provision is to give to the landlord, or reversioner of the land or water, a reasonable time to resist the claim of the easement, after the subject over which it is claimed falls into possession where an indefeasible title is claimed from 40 years' enjoyment. If this right of impeaching the claim is exercised by the landlord, the enjoyment gives no right at all; not even against the lessee, during whose time the right has been adversely enjoyed.

Pray bear in mind that every one of the periods of years is to be taken to be the period next before the suit or action wherein the claim shall be brought in question, which shows that the number of years required are entire periods; although in some cases, as I have pointed out to you, particular times may be excluded from the computation. There must have been an actual user of the right at the commencement of the period, and an user some time in the year next before the commencement of the action; but it will hardly be held necessary that there should be an user proved every year during the period. But I strongly recommend you not to omit in any one year the exercise of the right where you propose to rely upon the statute; for every neglect for a year will expose you to the loss of your easement.

In conclusion on this head, I would observe, that where your right to a private right of way is established, you may lose it in less than 20 years by ceasing to use it, and clearly showing an intention to abandon it. Mere non-user would not, however, be sufficient whereon to found the presumption of an abandonment. The non-user must be in consequence of something which is adverse to the user. Do not omit altogether to exercise rights which you have, if you do not mean to abandon them.

I have now only to express my hope that you may derive some benefit from my correspondence. If it merely teach you to distrust your own knowledge on the subject, it will not have been written in vain. Much which I have written has cost me little more than the labour of writing *currente calamo*, although the portions explaining the new Acts of Parliament, well as I am acquainted with them, have not been unattended by labour of a severer character. The learning which my Letters contain is, however, of common occurrence; but you will not therefore find it of less use. It has been justly observed, that refined sense and enlightened sense are not half as good as common sense. The same may be said of legal learning. It would have been idle in me to have furnished you with nice disquisitions on abstruse points of law. I have felt no anxiety in any case to point out to you how you may evade or break in upon any rule. I have avoided the lanes and byways, and endeavoured to keep you in the public high-road. If you wander from it, the blame will rest with yourself.—Farewell!

BOYLE FARM, 1*st Jan.* 1858.

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